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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 154

EDWARD R. DOWNING, RANDOLPH PHILLIPS, and 22,081 STOCKHOLDERS OF THE UNITED CORPORATION,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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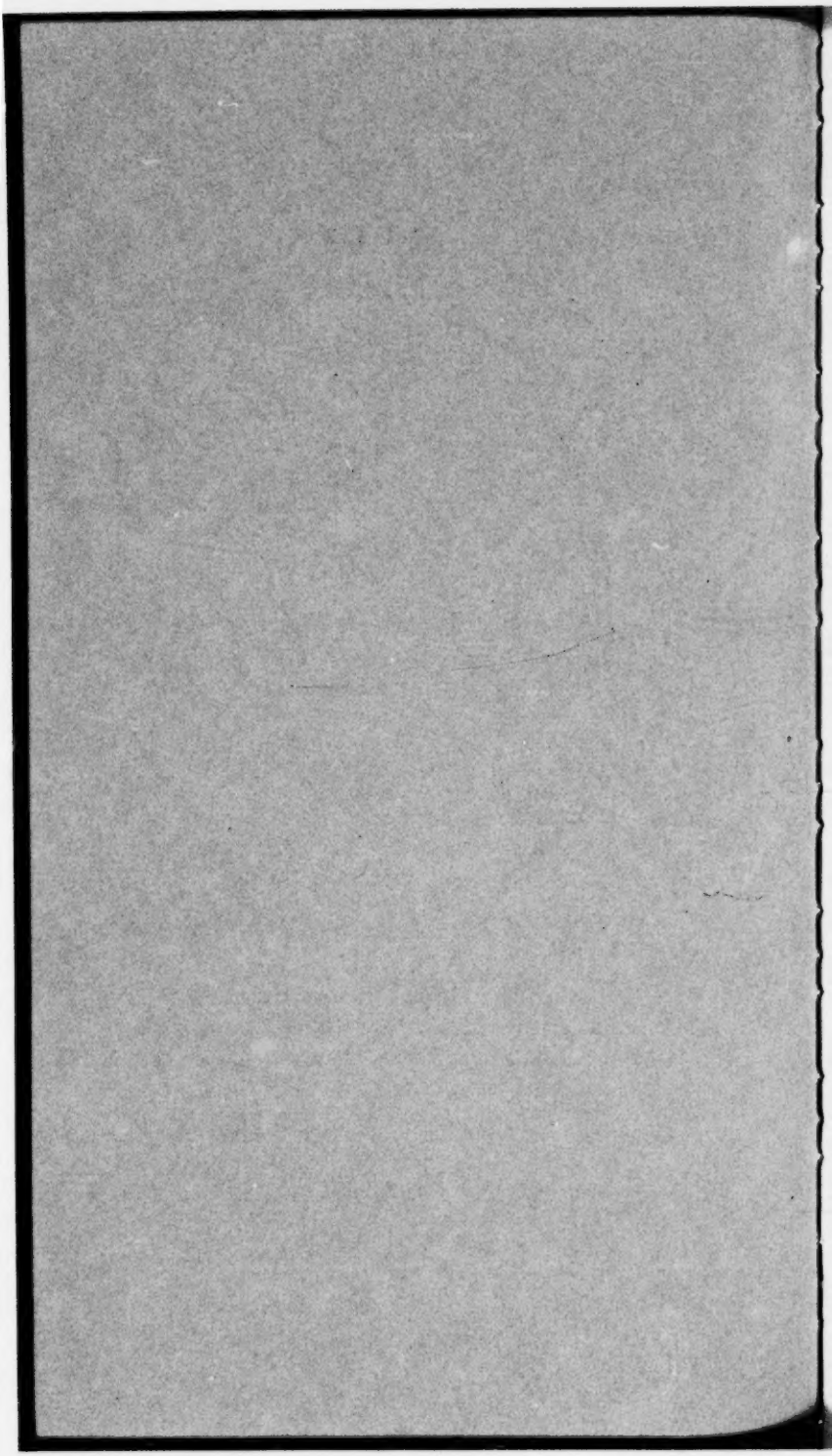

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ARGUMENT:

POINT ONE.—In finding that the S. E. C. had the "discretion" to permit an "economically unnecessary" and useless public utility holding company to become an investment company and transfer its controlling activities to other areas of the national economy, the Court below acted contrary to well established principles of law relating to the Public Utility Holding Company Act of 1935.

The conclusion that the "death sentence" standards of the Act, properly applied, require dissolution both of a "great-grandfather" and of "an economically useless" holding company has been affirmed 3 times by this Court, by 4 Circuit Courts of Appeal, in 73 prior cases by 17 Commissioners of the S. E. C., by its present General Counsel and by its present Director of the Division of Opinion Writing.

The Court below basically misinterprets this Court's decisions, omits any consideration of the legislative history and of the decisions in other circuits and avoids all mention of indisputable facts urged by petitioners that prove the Act makes mandatory the dissolution of "great-grandfather" and other "economically useless" holding companies 19

(1) The Court below failed to mention that the S. E. C. had found that United violated the "great-grandfather" clause in 23 instances, that United's continued existence was "economically unnecessary", that both the public interest and its stockholders had suffered "from the unnecessary corporate existence of United" and that "dissolution would be appropriate in this case" 22

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(2) The Court below failed to mention that Congress inserted into the Conference Bill the "great-grandfather" clause, thereby singling out that one type of holding company from all the rest for special treatment under the "death sentence" provisions of the Act 22

(3) The Court below failed to mention the statement, undenied and unqualified by any other conferee, of Representative Huddleston, a manager on the part of the House at the Committee of Conference, that the compromise bill "requires the dissolution of all holding companies other than those of the first and second degree", and that the first and second degree companies must reorganize by becoming heads of integrated systems or be dissolved 23

(4) The Court of Appeals failed to mention the S. E. C.'s own prior findings that Congress had "abandoned" and "eliminated the program * * * for the transformation of holding companies into operating companies or investment trusts". Yet the Court found, without any citation, that the Commission had "the discretion" to permit "a public utility holding company to cease to be such by becoming an investment company 24

(5) In 73 prior cases the S. E. C. found that the statute made dissolution of useless holding companies mandatory 25

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(8) The Court below basically misinterprets this Court's decisions in the *American Power & Light case,* 329 U. S. 90, and *Otis & Co.,* 323 U. S. 624 34

(9) The Court of Appeals failed to mention the latest decision of this Court on the question of whether liquidation of a useless company is mandatory or discretionary, *S. E. C.* v. *Central Illinois Corp.,* 338 U. S. 96, in which it affirmed the Commission's Findings that "there was no right to compensation for the termination of the investment, which like the termination of the stockholders' investments, had been 'brought about by the act of a sovereign power—in this case a Congressional mandate.' 10 S. E. C. at 1223, 1228 * * *" (p. 137) 39

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(10) The decision below is in conflict with the decision of the Court of Appeals for the 2nd Circuit holding, as requested by the S. E. C., that Section 11(b)(2) requires the dissolution of a useless company. 184 F. 2d 646 40

(11) The decision of the Court below is in conflict with the decision of the Court of Appeals for the 7th Circuit upholding the S. E. C.'s contention that "the continued existence" of North American Light & Power Co. "was in violation of the Act" and "that the dissolution was the result of a 'compulsory liquidation' by Congressional mandate", *City National Bank & Trust Co.* v. *S. E. C.*, 13 F. 2d 65, 67 41

(12) The decision of the Court below is in conflict with the decision of the Court of Appeals for the 6th Circuit that "any other conclusion" than dissolution is "impossible" for a company that "serves no economic purpose and no useful function" and that "this condition, which arose out of the existence of the System (company) and not out of its corporate structure, could be remedied only by terminating the existence of the System as a holding company." *Todd* v. *S. E. C.*, 137 F. 2d 475, 477-8 42

(13) The decision of the Court below is in conflict with the decision of the Court of Appeals for the 2nd Circuit in *New York Trust Co.* v. *S. E. C.*, 131 F. 2d 274, 276 43

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IN THE

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OCTOBER TERM, 1952

No.

EDWARD R. DOWNING, RANDOLPH PHILLIPS, and 22,081 STOCKHOLDERS OF THE UNITED CORPORATION,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners hereby pray that a writ of certiorari issue to review a judgment and decree of the United States Court of Appeals for the District of Columbia Circuit, dated March 31, 1953, affirming an order of the Securities and Exchange Commission, dated June 26, 1951. The order of the Commission approves a plan submitted by The United Corporation under Section 11(e) of the Public Utility Holding Company Act, and permits it to transform into an investment company instead of being liquidated and dissolved.*

---

* Edward R. Downing is the owner of 2,500 shares of the Common Stock of The United Corporation; Randolph Phillips in his own right is the beneficial owner of 1,100 shares and is the Attorney-

Opinions Below.

The opinion and judgment of the Court of Appeals is reported in 203 F. 2d 611 (R. 391). The Findings and Opinion of the S. E. C. dated June 15, 1951 are set forth in the Holding Company Act Release No. 10614 (R. 3), and the order thereon, dated June 26, 1951, at R. 46.

---

in-Fact and Proxy for 22,081 holders of 3,137,800 shares of the Common Stock of The United Corporation. Each of these stockholders appointed him in 1947 to represent them as Attorney-in-Fact and Proxy before the Securities and Exchange Commission or any Court in opposition to the Management's "Plan for Future Operations" which is the subject of this proceeding. (Tr. Doc. No. 277, pp. 7837-42.)

The SEC refused to allow petitioners Downing and Phillips, as an acknowledged Committee for the Common Stockholders to solicit further authorizations in 1951 on the ground that it was not necessary and would be a burden on the reorganization process. (Holding Co. Act Release No. 10291, December 15, 1950.) United then claimed on the brief, but not in the record, before the lower court that only 2,965 stockholders who gave Phillips their proxy in 1947 have not sold out their stock or did not vote for the management in 1951 on its automatic 1-party ballot.

The validity of the 22,081 proxies in the present proceeding was specifically upheld by the Court of Appeals for the Second Circuit in the appeal of that SEC decision. On April 30, 1951 the Court found:

> But the petitioner has not been denied an opportunity to solicit proxies for the forthcoming annual meeting of United and any support it there obtained would be as efficacious as at the present time in this regard, *especially where petitioner already represents 20% of the stockholders. Under such circumstances,* the SEC was well within its discretion in deciding that the chance of a purely advisory vote of some additional stockholders would not serve a useful purpose when balanced against the burden on the reorganization process.
>
> *Committee of Common Stockholders of The United Corporation* v. *S. E. C.*, 188 F. 2d at p. 899.

The Annual Meeting was held on April 11, 1951 and the court's decision was issued on April 30, 1951. Thus it was in error in finding that the Annual Meeting was "forthcoming", but this error was of no import since the effect of the decision was to confirm the validity for the present proceeding of the 22,081 proxies in the hands of the Committee's Chairman, Phillips.

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Jurisdiction.

The judgment and decree of the Court of Appeals for the District of Columbia Circuit was entered on March 31, 1953. (R. 417). The jurisdiction of this Court is invoked under Sections 239 and 240 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 346, 347), made applicable by Section 24 of the Public Utility Holding Company Act of 1935, 49 Stat. 803 (15 U. S. C. 79 *et seq.*).

Statute Involved.

The pertinent provisions of the Public Utility Holding Company Act, 49 Stat. 822, 15 U. S. C. 79, are the "death sentence" provisions set forth in Sections 1(c) and 11(b)(2):

SECTION 1. • • •

> (c) When abuses of the character above enumerated become persistent and wide-spread the holding company becomes an agency which, unless regulated, is injurious to investors, consumers, and the general public; and it is hereby declared to be the policy of this title, in accordance with which policy all the provisions of this title shall be interpreted • • • to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided in this title.

SEC. 11 • • •

> (b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:
>
> • • •
>
> (2). To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find neces-

sary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company.

Questions Presented.

1. Where the S. E. C. in 73 prior cases has held that Congress in the "death sentence" provisions of the Public Utility Holding Company Act made mandatory the dissolution of both 3rd degree ("great-grandfather") and all lesser degree holding companies which have been found to be economically useless, and the S. E. C. has been consistently upheld in this Court and the courts below in that interpretation over a period of 16 years,

(A) may it reverse such a prolonged administrative and judicial construction of the "death sentence" provisions? And,

(B) may it, after finding a company to be both a "great-grandfather" holding company and an

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"economically unnecessary" company from whose "unnecessary corporate existence" both the public and the investors have suffered, then permit the condemned company, *whose "dissolution" it has already found to be "appropriate"*, to enter the investment field and transfer its controlling holding company activities to other areas of the national economy than the utility industry? And

(C) may the S. E. C. disregard, in the words of this Court, the remedy *"most appropriate* to the effectuation of the policies of the Act"* and choose instead a remedy which will "destroy the remedial processes intended to be accomplished by the enactment"?**

2. Where the S. E. C. withheld an admittedly "appropriate" order of dissolution after 4 of its former officials became President, Vice-President, Assistant to the President, and Senior Counsel of a holding company with only 8 employees, may the administrative discretion of the S. E. C., assuming it existed, be sustained after admissions have been obtained that the Company's President and Counsel "influenced" (to quote the Court of Appeals) members of the S. E. C. in the exercise of that discretion *after* the record was publicly closed and after they had obtained leaks of the confidential judicial deliberations of the S. E. C.?

3. Did the Court of Appeals properly discharge its function as a court of review under the Public Utility Holding Company Act and the Administrative Procedure Act?

4. Did the S. E. C. adopt "a lax view of the fiduciary obligations" of United's president and counsel and fail "to

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* *American Power & Light Co.* v. *S. E. C.*, 329 U. S. at 118.

** *Spokane & Inland Empire R. R. Co.* v. *U. S.*, 241 U. S. 344, 360.

insist upon their scrupulous observance" as this Court in *S. E. C.* v. *Chenery Corp.*, 318 U. S. 80, has held is required of officers and directors of a company in reorganization under the Public Utility Holding Company Act? Was the Court of Appeals correct in holding United's president and counsel free of liability to removal from office for the acts depicted herein?

Statement of the Case.

United's Purpose "Is Obviously to Insure Continued Control by the Bankers." 13 S. E. C. 854.

The United Corporation was incorporated in the State of Delaware in January, 1929. Its original sponsors were the banking houses of J. P. Morgan & Co. and Bonbright & Co.* The partners of these two firms are responsible either directly or through their appointed successors and nominees for the original nomination and election of the present board of directors. (See Tr. Doc. No. 277).**

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* The latter banking firm wished

"to expand its activities in the electric utility field, and * * * sought to interest J. P. Morgan & Co. and Drexel & Co. (Morgan's Philadelphia branch) in the matter, believing that their participation would prevent competing interests from entering into the territories which Bonbright and Morgan-Drexel might designate as their exclusive sphere of influence. * * * The bankers' interest in these utility enterprises was easily discernible. No doubt so large a group of utilities would be in need of refinancing or new capital from time to time, thus providing a source of underwriting profits and fees for depositaries, registrars and transfer agents, and it was the sense of the organizers that they receive the lion's share of these emoluments. * * * A letter written by Thomas S. Lamont, a partner in J. P. Morgan & Co., to Lansing Reed, a member of the firm of attorneys who handled the legal phases of the organization of United * * * stated * * * (its) purpose 'is obviously to insure continued control by the bankers.'"

The United Corporation, 13 S. E. C. 854.

** Tr.—this abbreviation is used throughout for the unprinted part of the transcript of the proceedings before the S. E. C.

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The Bankers' Profits (1929 to 1950) = 52 Million Dollars.

During the period of time under review in the present case (1929 to 1950) that the bank directors and their present nominees caused United to make and retain its utility investments, the late J. P. Morgan, his son Henry, their partners and their Bonbright associates personally made more than 52 million dollars net profits as depositaries of United's funds and from transactions in United securities and those of companies in which they had caused United to invest and retain its funds (See "Studies in Finance", *Columbia Law Review*, Vol. 37, Nos. 5, 6, 7; and Hearings before the *Temporary National Economic Committee*, 76th Congress, 2d sess., Part 23, pp. 12069-12071, 12086, 12306-12315); also Tr. 5124; 7837.*

The Company's Record (1929-1950): Net Investment Losses: = 375 Million Dollars.**

Although United was organized in January 1929 it did not complete the issuance of its stock until the year 1931.

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* Under its *non-diversified* investment policy the management of United from 1929 to 1950 concentrated 95 percent of its assets, or more than 500 million dollars, in 6 companies in the utility industry, and the management, with the S. E. C. refusing to intervene, proposes to continue United in business as a *non-diversified* investment company in other areas of the national economy. The record of the TNEC above-cited, as well as the record in *Dayton Power & Light Co.* and *Morgan Stanley & Co.*, Holding Co. Act Release No. 2654 and in this case (Tr. 5132) shows that after United invested in these 6 companies (Tr. Doc. Nos. 154 to 174), Morgan Stanley & Co. received the exclusive bond financing of 17 different utility companies grouped into the systems headed by the 6 companies in question. Morgan Stanley alone or with Bonbright & Co. received as the result the management of 775 million dollars of bond issues to the exclusion of all other banking competitors. Net profits to Morgan Stanley alone were $4,282,000.

** This represents a loss of more than 82½% of the Common Stockholders' equity.

The total capital consideration received for its various securities was (Tr. Doc. No. 98, p. 4362; Tr. Doc. No. 154, pp. 6034-42):

Preference Stock	$124,500,000
Common Stock	446,000,000
Options Warrants	3,900,000
Total Capital Received	$574,400,000*

* The subsequent rise and fall in the net worth at market of United's assets, including cash, is shown in the following table to the last date of record. (Round numbers are used.)

December 31	Total Assets	Balance Available for Common Stock
1929	$332,000,000	$242,000,000
1930	389,000,000	265,000,000
1931	258,000,000	134,000,000
1932	261,000,000	126,000,000
1933	183,000,000	58,000,000
1934	141,000,000	16,500,000
1935	229,000,000	105,000,000
1936	248,000,000	124,000,000
1937	150,000,000	25,000,000
1938	164,000,000	35,000,000
1939	178,000,000	53,000,000
1940	127,000,000	761,000
1941	68,000,000	Minus *64,000,000*
1942	74,000,000	Minus *58,000,000*
1943	121,000,000	Minus *11,000,000*
1944[1]	76,000,000	Minus *2,000,000*
1945	122,000,000	52,000,000
1946	117,000,000	61,000,000
1947	107,000,000	51,000,000
1948	106,000,000	49,000,000
1949	88,000,000[2]	88,000,000[2]
1950, July 31	56,000,000	56,000,000

[1] Beginning in 1944 the Corporation proceeded to retire $125,000,000 of preference stock. This retirement was completed in April 1949.

[2] Includes $23,000,000 of Niagara Hudson Power Co. common stock distributed to United's stockholders on December 31, 1949.

Source: Annual Reports, The United Corporation, 1929 through July 31, 1950. (Tr. Doc. Nos. 154 through 174, pp. 6034-6180; Doc. No. 249, pp. 7801-4).

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The total capital contribution of the common stockholders of United was $446,000,000 in cash or securities, and the shrinkage of their equity amounts to $369,000,000, plus $3,900,000 for the now worthless option warrants, or a total market loss of 373 million dollars as of the latest balance sheet in the record (Tr. Doc. No. 249, p. 7801), that for July 31, 1950.

Former S. E. C. Officials Become 4 of United's 8 Employees.

The directors of the Corporation opposed from December, 1935 to March, 1938 the application of the Holding Company Act to the Corporation by refusing to register thereunder. On March 28, 1938, after the constitutionality of the registration provisions of the act was upheld in *Electric Bond & Share Co.* v. *S. E. C.*, 303 U. S. 419, the Corporation registered with the S. E. C. but thereafter resisted until January, 1944 any compliance with the standards of the Act.

Because of the above financial record and in the belief that the management's continued opposition to the statute was unwise and was jeopardizing the remaining equity of the stockholders, petitioner Phillips engaged the management in a proxy contest in February, 1943 (Tr. 5114, 5139, 5190-1). Petitioner's letter to the stockholders was titled "Is there any chance of saving your investment in The United Corporation?" (Tr. Doc. No. 286, p. 7849). Although unsuccessful in replacing any of the incumbent directors, petitioner's contest enlisted 14,000 small stockholders on his side owning 1,800,000 shares, or 12%, of the Common Stock, and was followed by the resignation in April, 1943 of George H. Howard, who had been President since 1929 and whose policies were supported by the exclusive control of the proxy machinery and the vote of the larger

stockholders who succeeded in mustering 37% of the voting stock (Tr. Doc. No. 98, p. 5114; Doc. No. 286, p. 7849).

Thereafter, a former S. E. C. employee, William M. Hickey, became President.* This appointment was made on April 22, 1943, after the present General Counsel of the S. E. C. and the Public Utilities Division had formally recommended that the Company be dissolved since it "serves no useful function whatever" and "was never more than a corporate screen for the investment banking activities of its promoters." Immediately after his appointment Hickey obtained with former S. E. C. General Counsel John J. Burns the leaks of the secret judicial deliberations of the S. E. C. and held the private talks with its members hereinafter mentioned.** In 1944 another former S. E. C. employee, E. C. Kennedy, became Vice President and

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* Hickey's career after leaving the SEC was built on his associations with the SEC. On June 9, 1942, Hickey testified:

> "I have held myself out to be a consultant on public utilities * * *"
>
> "Q. But you were retained by companies involved in proceedings before this Commission under the Holding Company Act? A. That is correct.
>
> Q. Approximately how many would you say? A. A large number. I would say 15 to 20" (SEC File Nos. 54-33; 59-25, Hearings, pp. 600, 682).

Burns, who recommended Hickey's employment by United, was described on December 4, 1950 by counsel for the SEC as "an experienced negotiator." Recommended Findings of Division of Public Utilities, p. 57; North American Co., *et al.*, SEC File No. 59-10.)

** These resulted in the S. E. C. withholding an "appropriate" order of dissolution. At the 1944 annual meeting of stockholders, United's counsel, Richard Joyce Smith, said with respect to the 1943 order issued 7 months earlier: "* * * We have no control over the time it takes the representatives of the Securities and Exchange Commission to make up their minds to agree with us. It has taken them just exactly five years" (S. E. C. File No. 54-89, Ex. 7-A, p. 53). Smith did not reveal that he with Burns and Hickey had privately talked with the S. E. C. members after the close of the public record and had obtained leaks of their secret judicial deliberations. (See pp. 55-68 of this petition.)

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together with the former S. E. C. General Counsel, Burns, who had become Senior Counsel and Director in 1937, these individuals achieved effective control of the 8-employee Corporation. A 4th former S. E. C. employee, Edward Roll, became Assistant to the President in 1947.*

The Hiring by United's Major Subsidiary of a 5th S. E. C. Official, the Chief Counsel of its Public Utilities Division in November, 1950, While This Case Was Under His Supervision.

A 5th S. E. C. employee, Harry G. Slater, Chief Counsel of the Public Utilities Division and counsel of record for it in this case, urged in 1942 on behalf of the Division that United be dissolved because "it served no useful legitimate economic function". In November 1950 the S. E. C.'s Public Utilities Division filed its Recommended Findings (Tr. Doc. No. 65) reversing its 1942 position and approving the proposal of United's management that it be allowed to stay alive. At the same time the Division opposed the proposals

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At the same 1944 annual meeting of stockholders Hickey openly flaunted his personal relationships with Commission members, saying that the last time he saw one Commissioner "he was very complimentary and told me what a great job he thought I was doing", and the last time he had seen a second Commissioner "he told me he thought I was doing just the right thing and I didn't see how I could do anything else in the way I was handling the business of the company." *Minutes of Annual Meeting*, March 1, 1944, p. 157. Statement of Chairman Hickey. (S. E. C. File 54-89, Ex. 7-A). At the same time Hickey publicly assailed S. E. C. counsel Foster and Slater as "irresponsible lawyers" because they had asked for dissolution of United, and told the stockholders the S. E. C. had given "virtual approval", *before* hearings, of the management's plan for retirement of its Preference Stock. *The New York Times*, March 2, 1944, p. 23 (Tr. Doc. Nos. 284, 285).

* Hickey testified: "At the time I became president, including myself, there were three officers and a handful of employees, maybe three or four, or something like that." (Tr. Doc. No. 98 at S. E. C. page no. 525.) Some 7 years after he became president, Hickey testified that on February 28, 1950 the working force had been expanded to 12 persons, of whom 5 were "an office boy, secretaries, file clerks, etcetera." *Id.*

of petitioners herein. A few days later Slater's employment as Assistant General Counsel of United's major subsidiary was announced.*

The Present Plan "For Future Operations."

The Order herein of June 26, 1951 approves a plan filed by The United Corporation described by it as "A Comprehensive Plan to Complete Its Transformation into An Investment Company" (Tr. Doc. No. 1, p. 1), of which the "Plan for Future Operations" is the last step, and has not yet come into play except in a limited way that will permit the easy dissolution of the company, if required at the end of court review.** The plan was filed on November 15, 1949 and amended 5 times on March 1, June 13 and July 27, 1950 and June 20 and 25, 1951 (Tr. Doc. No. 2, pp. 23-66). Under date of December 16, 1949 the S. E. C. issued its Notice of Filing and Order for Hearing (Tr. Doc. No. 3, p. 67).

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* Kennedy and Slater went directly from the S. E. C. to their new jobs, while in Burns' case there was an interval of 8 months, and Roll's of 4½ years. Hickey was employed in the United system in 1938, two years after leaving the S. E. C. and by United itself in 1939 and 1941-2, prior to becoming President in 1943.

** "* * * In any case, with its capitalization reduced to a single class of stock, *United will be in a position to distribute most or all of its portfolio holdings to its existing security holders.*" 13 S. E. C. 854, 900.

United now has only common stock. It has no debt.

"Market values of holding company securities have shown a steady rise since 1935. * * * The equitable treatment of all stock classes in dissolution has generally brought on a very substantial increase in security values."

59 Yale Law Journal, 1088, 1116 (1950), *Section 11(b) of the Holding Company Act: Fifteen Years in Retrospect.*

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Extended hearings took place on the plan and amendments on 26 days from January 24 through August 17, 1950, with submission of the case after oral argument to the Commission on December 20, 1950. The plan was approved by the S. E. C. in Findings and Opinion dated June 15, 1951 (R. 3), and by Order dated June 26, 1951 (R. 46). The petition for review was filed on August 23, 1951, and a stay granted petitioners which thereafter was enforced by order of the Court dated November 5, 1951.*

Petitioners, within the limitations permitted by the invocation of "privilege", developed evidence on the issue of dissolution. In their view the evidence is overwhelming against an exercise of the S. E. C.'s discretion in favor of keeping United alive by transforming it into "an investment company". It is petitioners' position that dissolution is compelled by the evidence and mandatory under the Act in view of the findings in this case. Whatever the case may be, however, on these points, petitioners contend there is no legislative warrant for allowing United to comply with the Act, as proposed here, by transferring its controlling holding company activities from the public utility field

* The court below granted petitioners a stay of that part of the "comprehensive" plan which permitted United to sell a 500,000-share block of common stock of Niagara Mohawk Power Corporation instead of distributing it to United's stockholders. When the SEC first orally opposed the stay in August, 1951 it was on the ground that the stock could be sold at the then prevailing price of about $23½ a share. On March 31, 1953, when the stay was dissolved the stock had risen 4 points, representing a gain for the Corporation of some $2,000,000 over the August, 1951 price. In view of this gain and petitioners' judgment, subsequently confirmed, that market prices were due to decline, petitioners did not apply for a further stay, since they believed it was preferable that United realize the 20 months gain than risk it by prolonged litigation. Since March 31st, United has been selling the stock at higher levels than prevailed in August, 1951.

to the non-public utility field.* *Plainly Congress intended to strike at an evil by eliminating and not transferring it.***

Reasons for Granting the Writ.

1. This is the first case, after 73 cases to the contrary effect during the prior 16 years, in which the S. E. C. has ruled that the "death sentence" provisions of the Public Utility Holding Company Act do not make mandatory the dissolution of a holding company found to be a "great-

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* The "plan for future operations" is described in the S. E. C. Opinion herein as follows:

Future Operations.

United has stated that * * * it will register under the Investment Company Act of 1940 as a closed-end, *non-diversified* management company. * * * *its primary purpose* will be to employ its capital in "special situations" as they may arise which in the judgment of the board of directors present favorable opportunities for profitable development. The situations contemplated by United for such investments are specified, *without limitation*, to be as follows:

(a) the financing of reorganizations through loans or the purchase of securities;

(b) The acquisition of securities of *closely held businesses* which may be sold or otherwise disposed of;

(c) The purchase of *working control* in businesses which in the judgment of United's board of directors offer opportunities for development and expansion;

(d) The purchase en bloc, and the resale piecemeal, of the assets of companies in liquidation;

(e) The acquisition of securities for the purpose of promoting in a lawful manner the merger or consolidation of two or more companies;

(f) The participation in new or existing enterprises along with qualified associates.

(S. E. C. Findings, pp. 14-15.) (R. 15-16.) (Emphasis supplied.)

** S. Rep. No. 621, 74th Cong., 1st Sess., p. 4 (1935), quotes with approval the following language in the President's message to Congress transmitting a report on public utility holding companies by the National Power Policy Committee:

"Where the utility holding company does not perform a demonstrably useful and necessary function in the operat-

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grandfather" and economically useless. There are at least 4 cases now pending before the Commission or the Courts in which, on the basis of the precedent herein, the issue is being raised as to whether the Act permits an economically useless holding company to transform into an investment company and thereby transfer its controlling activities to other areas of the national economy.* What is in issue here is *the death of the "death sentence"* for the tag-end and most dilatory and disreputable part of the fraternity of useless and malignant super-holding companies. If the "death sentence" is applied as it has been in the past some 200 million or more dollars of assets will be distributed to the stockholders in the 4 companies whose managements are now vigorously making a last-ditch stand to stop the dissolution of the useless and economically malignant companies from which they draw their fees and salaries. This is the first time that the issue herein has reached this Court in the terms of whether Congress intended to permit a *useless* holding company to stay in business by *extending* its controlling activities to other areas of the national economy. The issue involves a "specialized anti-trust act" of major importance and is an important one of federal law, whose fundamentals have been plainly settled by this Court, but are now abruptly unsettled by the contrary opinion below.

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ing industry and is used simply as a means of financial control, it is idle to talk of the continuation of holding companies on the assumption that regulation can protect the public against them."

It is this report on S. 2796, upon which the S. E. C. chiefly relies for its interpretation of the Act. (See pp. 46-7, *infra.*)

* As this petition goes to press we learn that the District Court for the Southern District of New York has just thrown out as in violation of the Holding Company Act a petition by the S. E. C. to enforce a transition plan for the transformation of the Electric Bond & Share Co. into an investment company.

2. The Court of Appeals below has obviously rendered a decision in conflict with the decisions of no less than 4 Circuit Courts of Appeal (two decisions of the 2nd, and one each of the 6th and 7th Circuits) (See pp. 40-43 of the attached brief), and has basically misinterpreted this Court's decisions in *Otis & Co.* v. *S. E. C.*, 323 U. S. 624 and *American Power & Light Co.* v. *S. E. C.*, 329 U. S. 90, while omitting all consideration of the latest case in this Court, *S. E. C.* v. *Central Illinois Corp.*, 338 U. S. 96. The very foundation of these 3 cases is that Congress made mandatory the dissolution or liquidation of "great-grandfather" and other useless holding companies, and there is not even a whisper of a suggestion that such companies may transform into investment companies. All 3 cases upheld dissolution, yet the Court of Appeals held that the first 2 provided "authority" for the result here. It only did this, however, after withholding its decision for 14 months after oral argument and after granting petitioners a stay which lasted almost 2 years.

3. Grave issues in the area of public morality are raised by the admissions of counsel in this case that 2 former S. E. C. officials "influenced" the basic order in secret post-hearing "consultations" with unidentified S. E. C. members, and obtained leaks of the confidential deliberations of the Commission. In failing to remove these officials from office, the S. E. C. violated the doctrine enunciated in *S. E. C.* v. *Chenery Corp.*, 318 U. S. 80, 85 that officers and directors of a company in reorganization under the Public Utility Holding Company Act are trustees who must be held to a scrupulous observance of their fiduciary obligations, and that "a lax view" of such obligations must be rejected. But equally important the acts herein set forth violate the "inexorable safeguard" rule of *Morgan* v. *United States*,

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304 U. S. 1, which held that "the rudimentary requirements of administrative fair play" demand "a fair and open hearing" as essential "to the maintenance of public confidence in the value and soundness of this important government process."

No less than 3 Congressional Committees have been concerned with some phase or other of the S. E. C.'s handling of this case.*

Summary of Argument.

POINT I. In finding that the S. E. C. had the "discretion" to permit an "economically unnecessary" and useless public utility holding company to become an investment company and transfer its controlling activities to other areas of the national economy, the Court below acted contrary to well established principles of law relating to the Public Utility Holding Company Act of 1935. The conclusion that the standards of the Act properly applied, require dissolution both of a "great-grandfather" and of "an economically useless" holding company has been affirmed 3 times by this Court, by 4 Circuit Courts of Appeal, in 73 prior cases by 17 Commissioners of the S. E. C., by its present General Counsel and by its present Director of the Division of Opinion Writing. The Court below basically misinterprets this Court's decisions, omits any consideration

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* See statement of Senator Paul H. Douglas as to the purchase and sale of S. E. C. influence as a commodity, quoted at p. 58 of this petition. Also the report of Counsel for the House Judiciary Committee, as set forth in The Washington Post for August 20, 1951, p. 1; and House Report No. 2508, 82nd Cong., 2nd Sess., "Study of The S. E. C." (1952), in which it stated "The Commission's performance in the Badger, Tucker, United (Corporation), West Kentucky Coal, and Kaiser-Frazer cases, the only cases we had the opportunity to study to some degree, has, however *been far from satisfactory.*" (p. 1.)

of the legislative history and of the decisions in other circuits and omits all mention of indisputable facts urged by petitioners that prove the Act makes mandatory the dissolution of "great-grandfather" and other holding companies found "economically useless" by the S. E. C.

POINT II. Although Congress in preliminary drafts of the Act in 1935 authorized a program for compliance by transformation of holding companies into investment trusts, the Court of Appeals omits the fact that the S. E. C. subsequently and unanimously found in 1942 that Congress, in the final enactment, had "abandoned" and "eliminated the program * * * for the transformation of holding companies into operating companies or investment trusts."

POINT III. The administrative discretion of the S. E. C., if it existed, can not be sustained in view of the admissions that The United Corporation's President and Counsel "influenced" members of the S. E. C. in the exercise of that discretion after the record was publicly closed and after they had obtained leaks of the confidential judicial deliberations of the S. E. C.

POINT IV. Assuming, arguendo, that Congress because of the earlier drafts of the Act intended that a holding company could transform into an investment company, it nevertheless made clear that the latter company was to be a "legitimate investment company" that did not perform "the function of control and management."

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ARGUMENT.

POINT ONE.

In finding that the S. E. C. had the "discretion" to permit an "economically unnecessary" and useless public utility holding company to become an investment company and transfer its controlling activities to other areas of the national economy, the Court below acted contrary to well established principles of law relating to the Public Utility Holding Company Act of 1935.

The conclusion that the "death sentence" standards of the Act, properly applied, require dissolution both of a "great-grandfather" and of "an economically useless" holding company has been affirmed 3 times by this Court, by 4 Circuit Courts of Appeal, in 73 prior cases by 17 Commissioners of the S. E. C., by its present General Counsel and by its present Director of the Division of Opinion Writing.

The Court below basically misinterprets this Court's decisions, omits any consideration of the legislative history and of the decisions in other circuits and avoids all mention of indisputable facts urged by petitioners that prove the Act makes mandatory the dissolution of "great-grandfather" and other "economically useless" holding companies.

The citations summarized in the above heading and which will be set forth below make obvious that there are 2 types of holding company under the Act, those which have been found to be economically useful and those found to be economically useless. A "great-grandfather" or 3rd degree company is statutorily condemned to extinction

under the "death sentence" as prima facie useless, while lower degree companies must have their uselessness or usefulness judged by all the Act's "death sentence" standards except the "great-grandfather" clause.* It makes a mockery of the Act to suggest that companies found to be useless and economically malignant were to be allowed to survive by dropping their malignant controlling activities in the public utility field and *extending* them instead to other industries. If the Act does not require the dissolution of useless and economically malignant companies, then there is no policy behind the Act. The elimination of such companies, not their extension to other fields of enterprise, is in fact its main purpose.

Congress gave "the Commission power to compel the elimination of holding companies deemed uneconomic". *Otis & Co.* v. *S. E. C.*, 323 U. S. 636-7. Congress also added the "substantial evidence" test [Section 24(a)] as to necessity for "continued existence" [Section 11(b)(2)] as well as other statutory tests and its policy declaration "in accordance with which policy all the provisions of this title shall be interpreted * * * to provide *as soon as practicable* for the *elimination* of public utility holding companies except as otherwise *expressly* provided in this title" [Sec. 1(c)]. In 73 prior cases the S. E. C. interpreted "elimination" to require dissolution. The Act does not *expressly* provide that holding companies may transform into investment companies.

Thus the above standards, even minus the requirement of Section 11(b)(2) in the "great-grandfather" clause

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* The compromise bill "does provide, however, that there shall be no more than two tiers of holding companies above an operating utility. This provision, in Section 11(b)(2) of the Act, is commonly referred to as the 'great-grandfather' clause." *The Commonwealth & Southern Corp.*, 11 S. E. C. 369 at Footnote 25.

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(see *The American Power & Light Co.* case, 329 U. S. 90, footnote 3), and plus the requirement that the SEC must "ensure" that the offending company does not have a "continued existence", compel dissolution of a company found to serve no legitimate economic purpose (*Protective Committee for Class A Stockholders of IHES* v. *S. E. C.*, 184 F. 2d 646, C. A. 2, 1950) and to be "a useless and expensive corporate entity" (323 U. S. at 635, footnote 17). As this Court said, there is "a veritable code of rules • • • for the Commission to follow in giving effect to the standards of §11(b)(2)." *American Power & Light Co.* v. *S. E. C.*, 329 U. S. 90 at 105. It is the combined effect of all or most of these rules and standards that compels dissolution of a company which has been found to serve no legitimate economic purpose. It is in this sense that the statute is mandatory, not in the sense of a mandate working in a vacuum.

The "continued existence" of United was not only found on the evidence to be "economically unnecessary" (13 S. E. C. at 876) but the SEC found that both the public interest and the stockholders had suffered "from the unnecessary corporate existence of United". (*Id.*) "It seems clear that dissolution would be appropriate" (*Id.* at 899). Thus the SEC had already chosen the appropriate remedy but withheld it on the plea of the management expressed in secret, post-hearing conferences. Not only did it violate due process of law in so doing but, as will be shown hereafter, the very statute it is charged with administering.

(1) The Court below failed to mention that the S. E. C. had found that United violated the "great-grandfather" clause in 23 instances, that United's continued existence was "economically unnecessary", that both the public interest and its stockholders had suffered "from the unnecessary corporate existence of United" and that "dissolution would be appropriate in this case."

These findings of the S. E. C. have all been set out at pp. 63-4 of this brief. Obviously they provide the basic background against which the Court of Appeals was required to adjudicate this case. The omission of this crucial background indicates the limitations and error of the lower court's approach.

(2) The Court below failed to mention that Congress inserted into the Conference Bill the "great-grandfather" clause, thereby singling out that one type of holding company from all the rest for special treatment under the "death sentence" provisions of the Act.

This will be dealt with in detail at pp. 45-52 of this brief. It should be obvious that if dissolution were not made mandatory under this clause plus the other standards of the Act referred to in the second and third paragraphs under this Point One (pp. 20-21, *supra*), then there is no reason for the clause.*

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* The Conference Report on the final bill stated:

> "Paragraph (3) of the subsection (b) of the Senate bill is not included in the substitute but there is included a *mandatory* provision requiring the Commission to cause *each* holding company, and each company in the same holding company system, to take such action as the Commission finds necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. The effect of this is to require holding companies to cease to be holding companies beyond the second degree."

This is the "great-grandfather" clause.

[House Rep. No. 1903 at pp. 69-70; 74th Cong., 1st Sess. (1935).]

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(3) The Court below failed to mention the statement, undenied and unqualified by any other conferee, of Representative Huddleston, a manager on the part of the House at the Committee of Conference, that the compromise bill "requires the dissolution of all holding companies other than those of the first and second degree", and that the first and second degree companies must reorganize by becoming heads of integrated systems or be dissolved.

Representative Huddleston, a manager on the part of the House at the Committee of Conference (79 Cong. Rec. 14619) stated after filing of the conference compromise language:

> "Mr. HUDDLESTON:
>
> "The Rayburn proposal is merely the 'death sentence' in a different form of words. * * *
>
> "The proposed Section 11 * * * requires the dissolution of all holding companies other than those of the first and second degree, and in practical effect restricts each of them to a single utility system. Under it the dissolution or reorganization of practically all the important companies will be forced."
>
> 79 Cong. Rec. 14167, August 22, 1935.

This was not denied by any conferee in either house and makes clear Congressional intent to dissolve all third and higher degree holding companies, while forcing reorganization of those of the first and second degree by limiting them to "a single utility system" under the integrations provisions of Section 11(b)(1), or dissolving those companies found incapable of integration (such as United, see 13 S. E. C. at footnote 123).* Such was the inevitable result

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* It is especially noteworthy that there was an omission of any mention in the Conference Report of the investment trust program mentioned in the prior Sen. Report No. 621 on the unamended S. 2796, while at the same time the Conference Report retained the second alternative program of compliance mentioned in the Senate Report, namely a compliance by reorganization as

of inserting into the compromise bill the "great-grandfather" clause and of retaining the "death sentence" provisions of the Senate bill. United was found to violate this clause in 23 respects. 13 S. E. C. 854 at 876. While the other changes in the compromise bill relaxed the "death sentence" for useful holding companies capable of integration as the heads of "a single utility system", the insertion of this clause strengthened and assured it for the useless "great-grandfather" companies such as United.*

(4) The Court of Appeals failed to mention the S. E. C.'s own prior findings that Congress had "abandoned" and "eliminated the program * * * for the transformation of holding companies into operating companies or investment trusts". Yet the Court found, without any citation, that the Commission had "the discretion" to permit "a public utility holding company to cease to be such by becoming an investment company".

Neither the *Otis* case, 323 U. S. 624, nor the *American Power & Light Co.* case, 329 U. S. 90 even mention any proposal for transforming a holding company into an investment trust or investment company.** Both cases

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the head of a single integrated system. [H. R. Rep. No. 1903, 74th Cong., 1st Sess. (1935).] The S. E. C. specifically found "United * * * does not wish to be head of an integrated system, and indeed, under our findings *it cannot do so.*" 13 S. E. C. at footnote 123. This makes unmistakably clear that the 2 options of the unamended S. 2796 were no longer available in the Conference bill. (See pp. 46-7 of this brief.)

* Since Mr. Huddleston voted against the conference bill, it is noteworthy that his statement was unchallenged. Obviously if the opposition to the "death sentence" had wrongly construed its intended application, the managers in favor of the bill would have promptly challenged his statement. But not one supporter or opponent of the final bill in the Committee of Conference arose to take issue with this crucial statement of legislative intention on the most bitterly fought issue in the new law.

** The S. E. C. informed the court below that the terms investment trusts and investment companies, as used in the unamended Senate bill and report thereon, "are interchangeable as a matter of common usage and as used in the legislative background." (S. E. C. brief, p. 19, f. n. 31.)

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uphold dissolution orders of the Commission, the first that of a "great-grandfather" company, where the point that liquidation and termination of the corporate existence of such a company is mandatory, was an essential basis of the decision; while the second makes clear that dissolution of a useless company, offending less against the Act than a "great-grandfather," is also required. At no point did the Court of Appeals discuss the objections of petitioners to the alleged "authority" of these cases for the result herein.

(5) In 73 prior cases the S. E. C. found that the statute made dissolution of useless holding companies mandatory.

During hearings before the Senate in 1951, the S. E. C. was asked by the Committee on Appropriations for a list "showing the companies dissolved or reorganized under Section 11" of the Holding Company Act since its enactment. The S. E. C. responded by listing the names and number of companies dissolved.* From June 15, 1938 to December 31, 1950 the various companies dissolved number as follows:

Holding Companies	73
Electric and/or gas companies	49
Nonutilities plus utilities other than electric and/or gas companies	165
Total Dissolved Companies	287

The United Corporation is the sole holding company which, *after* both the public interest and that of the stockholders was found by the S. E. C. to suffer "from the

* Hearings before the Subcommittee of the Committee on Appropriations, U. S. Senate, 82nd Congress, on Independent Offices Appropriations Bill, 1952 at p. 372-374.

(company's) unnecessary corporate existence" and *after* a finding that "dissolution would be appropriate" had been entered, was allowed in the period from June 15, 1938 through June 15, 1951 (the date of the S. E. C.'s Findings & Opinion herein) to stay alive and then to transform into an investment company.*

This Court has repeatedly held that where language used in a statute had acquired a settled meaning in court decisions, Congress will be presumed to have used the language to convey that meaning. *Case* v. *Los Angeles Products Co.,* 308 U. S. 106. A similar rule should apply here, where the SEC in 73 prior cases has given the "death sentence" provisions of the Act the settled meaning of

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* The S. E. C. in a press release of August 20, 1951, unlike its Findings & Opinion of June 15, 1951, for the first time set forth the alleged precedents for its action herein:

> "The first instance in which the Commission approved a plan providing for the transformation of a holding company into an investment company occurred as far back as 1939 in one of the SEC's earliest decisions under the Holding Company Act. *Utilities Power & Light Corporation,* 5 S. E. C. 483,497. In 1945 International Utilities Corporation was similarly granted permission to become an investment company. Holding Company Act Release No. 6181.
>
> Thus the Commission's determination in 1943 that United might become an investment company did not represent 'a curious and a sudden shift' in SEC policy, as one newspaper put it."

The fact that the company involved in the first case, Ogden Corporation, was then in process of dissolution (see Moody's Manual of Investments, 1951 edition, p. 646) and was never found by the S. E. C. to be a harmful or useless company, as was United, was *omitted* by the Commission. It also *omitted* the fact that the company in the second case was the General Water Gas & Electric Co., which was dissolved. (See company No. 34 on list cited in previous footnote.) The S. E. C. further *omitted* that International Utilities Corp. was exempted from the Act under Section 3(a)(5) as a company having "no public utility subsidiaries owning properties or conducting operations in the United States." (HCAR No. 6181, p. 8); and that 76% of Ogden's common stock was owned by "an investment company registered under the Investment Company Act of 1940." (HCAR No. 8402, f. n. 4.)

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"dissolution". The courts in construing a statute must give weight to the administrative practice. *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294, 315.

Among the 73 holding companies which the S. E. C. has ordered dissolved or compelled to dissolve "voluntarily" under "induced voluntary dissolution"* are the following:

Name of Holding Company[1]	Consolidated System Assets[2]
American Power & Light Co.	$ 851,000,000
American States Utilities Corp.	14,000,000
American Water Works & Elec. Co.	505,000,000
Commonwealth & Southern Corp.	1,204,000,000
East Coast Public Service Co.	2,000,000
Electric Power & Light Corp.	577,000,000
Engineers Public Service Co.	284,000,000
Federal Water & Gas Corp.	180,000,000
Great Lakes Utilities Co.	445,000
Middle West Corporation	644,000,000
Northern States Power Co.	282,000,000
Portland Electric Power Co.	110,000,000
Standard Power & Light Corp.	866,000,000
United Light & Railways Co.	859,000,000

* The phrase is from S. E. C. Judicial Decisions, Vol. 1, p. 323.

[1] The full list of 73 companies will be found at pages 373-4 of the Hearings on the Independent Offices Appropriations Bill, 1952, Subcommittee of Committee on Appropriations, Senate, 82nd Cong., 1st Sess.

[2] As of June 30, 1946. From Report of SEC Public Utilities Division of same date.

The 73 prior cases, in which the S. E. C. interpreted dissolution of a useless holding company to be required, were decided by 17 past or present commissioners.

The following S. E. C. members participated in these 73 prior decisions:*

CHAIRMEN: William O. Douglas, Jerome N. Frank, Edward C. Eicher, Ganson Purcell, James J. Caffrey, Edmond M. Hanrahan and Harry A. McDonald.

COMMISSIONERS: Robert E. Healy, Leon Henderson, Sumner T. Pike, Edmund Burke, Jr., Robert H. O'Brien, Robert V. McConnaughey, Richard B. McEntire, Paul R. Rowen, Edward T. McCormick and Donald C. Cook.

Some of the 73 cases were not on "great-grandfather" holding companies. Thus, if lesser offenders against the statute's standards received the "death sentence", no equitable reason exists for finding that Congress intended a lighter penalty for the greater offender.

In affirming the S. E. C.'s order dissolving a useless holding company which was not a "great-grandfather" this Court said:

> "There is an absence of substantial evidence that either American or Electric is presently able to perform any useful role in the operations of its subsidiaries, such as organizing them into integrated systems or furnishing them with capital or cash.
>
> "* * * Instances of past functions relating to subsidiaries reveal either harmful results or the guiding hand of Bond and Share.

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* The first cases included *American Water Works & Electric Co.*, 2 S. E. C. 972 (1937) and *Republic Electric Power Corp.*, 3 S. E. C. 992 (1938), which are companies Nos. 5 and 83 on the list above cited. Other companies ordered dissolved, but not on this list because thus far only partially liquidated, include the IHES, decided December 7, 1949, Holding Co. Act Release No. 9535.

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"• • • American and Electric are but paper companies without legitimate functional purpose."

American Power & Light Co. v. *S. E. C.*, 329 U. S. at pp. 109, 110, 112.

American offended in fewer respects against the statute than United, which offends in all respects. (See headnotes 13 S. E. C. 854.) Unlike United, in American's case there was no violation of Section 11(b)(1), the integration section. [United's violation of this section is summed up by footnote 123, 13 S. E. C. 854.] American violated only Section 11(b)(2), but as the Court said: "The so-called 'great-grandfather' clause of §11(b)(2) is not involved in this case." 329 U. S. at footnote 3. United however was found to violate the "great-grandfather" clause in 23 cases. See 13 S. E. C. at 876. Furthermore, American was only an intermediate holding company while United, like the dissolved companies in the *Otis* case, 323 U. S. 624, and the *Central-Illinois* case, 338 U. S. 96, is a top holding company.

Thus, American was a much milder offender against the Act than United but met a harsher fate against which it protested in vain. Such an inconsistent adaptation of remedies to offenses illustrates the arbitrary and capricious character of United's extraordinary immunity from the proof required under "the continued existence" standard of the Act.*

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* The leading Court of Appeals and S. E. C. case on this point found:

"There has been an improvement in the financial condition of the IHES, and it no longer violates the 'great-grandfather' provision of Section 11(b)(2). Assuming also • • • that there is no longer any inequitable distribution of voting power, the foregoing factors would not constitute such a change in the conditions upon which our dissolution order was predicated as to justify its modification. The basic consideration underlying our order was our finding

The Death of the "Death Sentence".

The Public Utility Holding Company Act "pronounced the 'death sentence' on an industry whose history had been marked by spectacular financial profiteering and unbridled growth of corporate empires. * * * *The most extensive of these corporate giants was The United Corporation,* a super-holding company which, through a minority of voting stock, controlled properties extending from the St. Lawrence River to the Gulf of Mexico. Its (controlled) assets were over four billion dollars." *Section 11(b) of the Holding Company Act: Fifteen Years in Retrospect.* 59 Yale Law Journal 1087 and f. n. 4.

Dissolution has been compelled from the tiny $445,000 Great Lakes Utilities Company to the giant billion dollar Commonwealth & Southern Corporation. Great and small must dissolve, except that *"the most extensive"* corporate giant, and therefore *the most useless,* alone is permitted to

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that IHES *served no economic purpose* and performed no useful function as a holding company with respect to its subsidiary companies and that consequently its *continued existence* unduly and unnecessarily complicated the structure of the holding company system in violation of the standards of Section 11(b)(2). (Emphasis in original.)

* * *

"Under the circumstances, to justify a modification of the dissolution order, *it is necessary to show that conditions have so changed that a legitimately useful function from the point of view of Section 11 may be imparted to IHES* It is not sufficient to point to such things as an improvement in the financial condition of IHES, the alleged elimination of the inequitable distribution of voting power and the elimination of the violation of the great-grandfather clause, since changes of this kind in no way alter the basic fact that *the continued existence of IHES* offends the policy and standards of the Act." (Emphasis supplied.)

International Hydro-Electric System, Holding Co. Act Release No. 9535, p. 8; affirmed sub. nom. *Protective Committee for Class A Stockholders of IHES* v. *SEC,* 184 F. 2d 646 (C. A. 2, 1950); See also *Todd* v. *SEC.,* 137 F. 2d 475 (C. A. 6, 1943).

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escape dissolution. Instead it is given permission to transfer the malignant holding company activities to other areas of the national economy.

Since the decision in United's case the management or security holders of 3 more companies in the "great-grandfather" and other useless company category have sought to have the United precedent made applicable to them. In the *International Hydro-Electric System* case, two groups of security holders, both represented by former members of the S. E. C., one representative being a former Chairman, are jointly seeking to set aside an order of dissolution *that was issued during the tenure of these 2 Commissioners* and for which they successfully sought affirmance in the courts. See *Todd* v. *S. E. C.*, 137 F. 2d 475 (1943) and Holding Co. Act Release No. 9535.

The notorious Electric Bond & Share Co. (see *Electric Bond & Share Co.* v. *S. E. C.*, 303 U. S. 419; *Goldstein* v. *Groesbeck*, 142 F. 2d 422, C. A. 2, cert. den., 323 U. S. 737; *Electric Bond & Share Co.*, Holding Co. Act Release No. 10870), after retaining former S. E. C. General Counsel Burns, has already succeeded in procuring S. E. C. rulings that open the way to its following the United example. See HCAR No. 11004, decided February 6, 1952, at p. 11; and HCAR No. 11675, pp. 16-18, also f. n. 38.

It is clear that if the United decision is allowed to stand it will mean the death of the "death sentence" and a new life for the tag-end and most dilatory and disreputable of the holding companies.

(6) Section 1(c), the policy Section, for application of the "death sentence", requires "elimination of public utility holding companies *except as otherwise expressly provided in this title.*" The Act makes no express provision for the "continued existence" of "great-grandfather" or any other useless holding companies nor for their conversion into investment companies.*

Section 1(c) of the Act reads in pertinent part as follows:

> "* * * it is hereby declared to be the policy of this title, in accordance with which policy all the provisions of this title shall be interpreted, * * * to provide as soon as practicable for the *elimination* of public utility holding companies except as otherwise *expressly* provided in this title." (Italics supplied.)

The 1943 order directed United "to cease to be a holding Company". 13 S. E. C. 854. United's management has

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*** "§438—Where Administrative Sanction Not Prescribed in Terms by Statute.**

"Where an agency is given discretionary authority to direct such affirmative action to be taken as will effectuate 'the policies' of an act,[35] or to 'prevent persons * * * from using unfair methods of competition * * * and unfair or deceptive acts or practices * * *,'[36] or otherwise make a direction not specifically provided in terms by statute, the question whether particular affirmative action conceived by an agency and directed to be taken, which is not specifically set forth in the act itself, is legally appropriate for the facts found, is similarly a judicial question. It is, however, broader in scope than in the orthodox case where the administrative sanction is mere repetition of a legislative mandate set forth in terms in the statute. It calls for judicial consideration *as to whether the direction is reasonably adapted to the situation which calls for redress in the light of the policies of the act and establishes principles of law.*[37]"

"[35] *The N. L. R. Act*, 29 USCA 151, 160 (c); and the Agricultural Adjustment Act of 1937, 7 USCA 45 (c).

"[36] The Federal Trade Commission Act, 15 USCA 45 (a).

"[37] Federal Trade Commission (citing cases).
Interstate Commerce Commission (citing cases).
N. L. R. B. (citing cases).
Secretary of Agriculture (citing cases).
State Agencies (citing cases).

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consented to the order. Thus it is conceded that United must be "eliminated" as a holding company, but it is argued that "elimination" does not mean "dissolution". It means, the S. E. C. now says, that a holding company in the public utility field may "eliminate" itself by becoming a holding company in the non-utility industry.*

The sole holding companies "expressly" permitted by the statute to stay in existence are those which are exempted from the Act under Section 3(a). It is conceded that United does not fall into any of these exempt categories.

Under Section 11(b)(1) and (2) a holding company may stay in existence as the head of one or more integrated systems if its "corporate structure or continued existence * * * does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders of such holding company system" and it is not a holding company of subsidiary companies any of which "itself has a subsidiary company which is a holding company". Since the SEC has found that United's exist-

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"For a discretionary administraive order prescribing 'affirmative relief' to be valid, the particular affirmative command made *must be supported by an intent in the act itself,* as shown by its *language* and history, to accomplish that purpose, must be within the act's terms, and *must have adequate support, as a matter of law, in the findings, which must in turn be supported by substantial evidence.*[38]"

"[38] *N. L. R. B.* v. *Pennsylvania Greyhound Lines Inc.*, 303 U. S. 261 (and other cited cases)."

Vom Baur, *Federal Administrative Law*, Vol. 1, pp. 439-440; 1942 Edition. (Emphasis supplied.)

* Although United describes its proposal as a transformation into "an investment company" it will be in fact a holding company as that term is used in the Holding Company Act [Sec. 2(a)(7)(A)] except that it will hold and control non-public utility companies instead of utility companies. Its plan so provides. (See page 14, first footnote, this brief.)

ence is in violation of all these enumerated standards (13 S. E. C. 854), it is conceded that it may not stay alive as a head of an integrated holding company system.

(7) The S. E. C. has represented to this Court that "elimination" means "dissolution."

The S. E. C. informed this Court in its brief in *American Power & Light Co.* v. *S. E. C.*, 329 U. S. 90:

> "The word 'elimination' may carry the connotation of removal or dissolution according to its context. The context in which it is used in Section 1(c) makes it clear that it was intended to mean 'dissolution'." (Brief for S. E. C., p. 159, footnote 131.)

Section 1(c) requires in its second clause that "all provisions of this title" shall be interpreted "in accordance with the policy" set forth in this section.

(8) The Court below basically misinterprets this Court's decisions in the *Amercian Power & Light* case, 329 U. S. 90, and *Otis & Co.*, 323 U. S. 624.

In its decision at 203 F. 2d 611, page 622 (R. 391) the Court of Appeals makes its ruling on the fundamental statutory issue in this case in the following language:

> "We think it is within the discretion of the Commission to permit a public utility holding company to cease to be such by becoming an investment company and that it is not required by the statute to order dissolution. On the authority of *American Power & Light* and *Otis & Company* cases we hold that the Commission may exercise its discretion as to whether to require dissolution under §11(b)(2)."*

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* The Court of Appeals relied on the language in 329 U. S. at pp. 113-115 which in pertinent part reads:

> "Thus the compromise bill which became law omitted the unconditional provision of §11(b)(3) for the elimination of all holding companies within five years, *substituting therefor the 'great-grandfather clause'* of §11(b)(2), and

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The Court of Appeals neglected even to mention one of the crucial facts that disqualifies the first case as authority for the proposition for which it is cited as applicable to the case at bar. Only an intermediate holding company was involved in that case, and the Supreme Court explicitly stated:

> "The so-called 'great-grandfather' clause of § 11(b) (2) is not involved in this case." 329 U. S. at footnote 3.

United was found, as above noted, to violate the "great-grandfather" clause in 23 respects. 13 SEC at 876.

Furthermore, the discretion the S. E. C. has as to remedies, under this Court's findings in the above cases, is not with respect to whether or not there shall be death under the "death sentence", but as to the means by which that death will be achieved: whether in the required liquidation the *termination* of the company's "continued existence" is to be by "dissolution of a particular company in the holding company system or (by) resorts instead to

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gave the Commission discretion to determine the necessary steps for compliance instead of specifying reorganization or dissolution. There is nothing to indicate that the framers of the compromise bill meant to forbid reorganization or dissolution as remedies which the Commission might choose. Indeed, the fact that these two remedies had been previously specified is strong evidence that they were in the minds of those who wrote *the portion of §11(b)(2) now under consideration*, and that those persons merely wished not to restrict the Commission to those two remedies; they thus gave the Commission discretion to choose whatever remedy it felt necessary."

From this the court below seems to argue that Congress intended to give the S. E. C. the discretion whether or not to dissolve a useless holding company and one which has been found to be a "great-grandfather" although this is not "the portion of §11(b)(2) now under consideration", as this Court pointed out in footnote 3 of 329 U. S. 90. We point out hereafter the flaw in the argument that the above language gave the S. E. C. the discretion whether or not to dissolve a company found to be useless and to perform no legitimate economic function.

the devices of merger or consolidation.'"* *Otis & Co.* v. *S. E. C.*, 323 U. S. 624 at 637-8.

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* At no point did the Supreme Court observe or hold that dissolution was not required for such companies in the sense implied by the court below, *i.e.*, of not requiring an end to their existence. Had it done so, there would have been no issue to determine. It said at 625:

> "An important although narrow legal point in the interpretation of the Public Utility Holding Company Act of 1935 is involved in this case. This is whether a plan under §11(e) of that act may be 'fair and equitable' to preferred stockholders within the meaning of those words as used in that section, which allows a participation by junior common stockholders in the distribution of the assets of a registered holding company, which is *liquidated* in compliance with §11(b)(2), before the senior preferred stockholders receive securities whose present value equals the preferred's full liquidation preferences."

At page 629 this Court said:

> "* * * (The) single issue as to whether, *in the liquidation* of a holding company by order of the Commission under §11(e), a participation by junior security holders in the assets is permissible before preferred security holders have received the entire liquidating preference secured to them by the company's charter * * *."

All that this Court held, as shown by the excerpts here quoted, was that the "continued existence" of the company could have been terminated by the alternative remedies available of "dissolution * * * *or* * * * the devices of merger or consolidation" (323 U. S. at 637-8). Since this was so, the Court held, no windfall should accrue to the preferred stockholders simply because the *termination* took the form of a dissolution. No mention is made of continuation of the corporate existence in the form of an investment trust.

The finding at 323 U. S., pp. 637-8 reads:

> "* * * Nor should common values be made to depend on whether the Commission, in enforcing compliance with the Act, resorts to dissolution of a particular company in the holding company system, or resorts instead to the devices of merger or consolidation, which would not run afoul of a charter provision formulated years before the adoption of the Act in question."

A merger or consolidation necessarily terminates the "continued existence", as does dissolution, of the liquidated one of the two or more merged or consolidated companies. The S. E. C. so held in the *International Utilities Corp.* case. (See Holding Co. Act Release No. 9535, p. 16 at footnote 29, which amplifies 15 S. E. C. 435,440.)

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The other "discretions" of the S. E. C. (329 U. S. at 113-115) refer to its power to determine whether or not by reorganization a holding company may be changed so as to be a proper head of an integrated system under Section 11(b)(1) or a *useful* intermediate company under 11(b)(2) in a simplified holding company system that has a proper capital structure and a fair distribution of voting power.*

It was the "great-grandfather" clause and the findings of uselessness that brought the United Light & Power Company, the subject company of the *Otis* case, into (in the words of the S. E. C. decision therein) the "category

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* As the S. E. C. successfully argued in the 2nd Circuit Court of Appeals (brief, p. 16, in *Protective Committee for Class A Stockholders of IHES*, 184 F. 2d 646, which affirmed Holding Co. Act Release No. 9535):

> "The appropriateness of the doctrine of economic justification in determining whether the *continued existence* of a holding company violates the standards prescribed in Section 11(b)(2) has been recognized by the Supreme Court in *American Power & Light Co.* v. *S. E. C.*, 329 U. S. 90, 116 (1946), as well as by the Court of Appeals for the Sixth Circuit in affirming the Commission's dissolution order in the instant case. (S. E. C.'s emphasis.)
>
> Since this conclusion was based *upon the very existence* of IHES and not upon its corporate structure, it is clear that *no internal reorganization of IHES, nor improvement in its financial condition, nor compliance with the 'great-grandfather clause,' nor equitable distribution of voting power could conceivably give IHES any economic justification for continued existence.*" (Our emphasis.)

The failure of the S. E. C. to find any "economic justification" for the continued existence of United is fatal to the order herein:

> (After quoting from Section 1(c). "Thus, the Act makes it indisputably clear that *the Commission has neither the duty nor the right to attempt to breathe vitality and function into holding company units which do not possess either.* Especially is this the case where, as here, the finding of the Commission is that the violation of the statutory standards is caused *by the continued existence* of the petitioner." (Our emphasis.)
>
> Brief for S. E. C. in *American Power & Light Co.* v. *S. E. C.*, p. 71. May 1943. Court of Appeals, 1st Circuit, 141 F. 2d 606; affirmed in 329 U. S. 90.

of holding companies which Congress has determined must *not* (the S. E. C.'s emphasis) be permitted to continue in operation, in the interests of the public, investors and consumers" (13 S. E. C. 1, 9). Since it fell into this category the S. E. C. said "the company's security holders are prevented from maintaining their respective interests *in a going concern*" (*Id.*). The Court below utterly fails to disclose that United Corporation, like United Light & Power in the *Otis* case, falls into the "category" of the companies "not permitted to continue in operation • • • (as) *a going concern,*" as those categories were determined by the S. E. C. in the *Otis* case, which was decided on April 5, 1943, only 6 months prior to the decision in the *United* case.

The Court of Appeals thus mistakes the *Otis* case as *"authority"* for the proposition that this Court decided the S. E. C. has "discretion" whether to liquidate or keep alive a "great-grandfather" or other useless holding company.

There is no such holding or language in the Otis opinion. In fact, exactly the contrary finding was made by this Court.

The entire Court agreed with the S. E. C. and Chief Justice Stone, writing for the minority, on the point "that the stockholders have no right not to have the company liquidated" (*Otis* case, 323, U. S. at 647). And in its opinion the S. E. C. explicitly found that "the duty to liquidate arises solely by virtue of a sovereign act, and in giving effect to the Congressional *mandate* we must not allow *the liquidation* itself to add value to one class of securities at the expense of another" (13 S. E. C. 1, 9). What is mandatory is obviously not discretionary.

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(9) The Court of Appeals failed to mention the latest decision of this Court on the question of whether liquidation of a useless company is mandatory or discretionary, *S. E. C.* v. *Central Illinois Corp.*, 338 U. S. 96, in which it affirmed the Commission's Findings that "there was no right to compensation for the termination of the investment, which like the termination of the stockholders' investments, had been 'brought about by the act of a sovereign power—in this case a Congressional mandate.' 10 S. E. C. at 1223, 1228 * * *" (p. 137).

The latest case in this Court on this question is not the 1946 *American Power & Light* case, but the 1949 *Central-Illinois* case, which affirmed the S. E. C.'s findings relative to the dissolution of the Engineers Public Service Company:

> "Commissioner Caffrey * * * added that Engineers as a holding company of a single utility company, would have been subject to proceedings under §11(b)(2) of the Act had it not come forward with a plan. Its *dissolution* therefore, was a logical step following the required compliance with the Commission's orders under §11(b)(2), *and was not voluntary.* Commissioner Hanrahan concurred * * *" 338 U. S. 109-10, footnote 13, citing Holding Co. Act Release No. 7119).
>
> "The Commission * * * held that there was no right to compensation for the termination of the investment, which *like the termination of the stockholders' investments,* had been 'brought about by *the act of a sovereign power—in this case a Congressional mandate'.* 10 S. E. C. at 1223, 1228 * * *."
>
> *S. E. C.* v. *Central Illinois Corp.*, 338 U. S. 96, 137. (Emphasis Supplied.)

(10) The decision below is in conflict with the decision of the Court of Appeals for the 2nd Circuit holding, as requested by the S. E. C., that Section 11(b)(2) requires the dissolution of a useless company. 184 F. 2d 646.

The S. E. C. stated:

> "We have found that, apart from the asserted tax advantages, there is no economic justification for the continued existence of IHES and that its elimination is required by Section 11(b)(2). Liquidation and *dissolution* of IHES *is the prescribed course of* compliance with *this basic statutory requirement.*"
>
> *International Hydro-Electric System,* Holding Co. Act Release No. 9535, p. 12. Affirmed 184 F. 2d 646, 2nd Cir. (1950).

In sustaining the S. E. C.'s order of dissolution in the IHES case, Circuit Judges Learned Hand, Swan and Clark in a *per curiam* decision dated October 24, 1950—shortly before submission of the United case to the Commission for decision—explicitly found that the Act "ensures" dissolution of an economically useless holding company.*

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* "* * * We hold that the Commission is right in concluding that the elimination of undue and unnecessary complication in a corporate structure involves an inquiry into the 'economic justification,' if any, for the 'continued existence' of a holding company; and that in the case at bar the Commission was right in finding that there was no such 'justification' for the 'continued existence' of the International Hydro-Electric System.

* * * * * *

"It is this subdivision alone [Section 11(b)(2)] which provides for the dissolution of a holding company, *not only expressly* in the second sentence; but also in the first sentence by the words 'ensure that the * * * continued existence of any company in the holding company system does not unduly or unnecessarily complicate the structure.'' The two subdivisions are not mutually exclusive; there is no reason why the 'capital structure' of a 'system' may not be 'unnecessarily complicated,' even though the holding company has 'limited' its 'operations' to those of 'a single integrated public-utility system.' The two purposes are indeed separate; but, if it be true that a holding company contributes no benefit to the 'operations' of an 'integrated * * * system,' surely

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United's *existence* has been found by the SEC to "unduly or unnecessarily complicate the structure" of its holding company system. 13 S. E. C. 854, see first headnote.

(11) The decision of the Court below is in conflict with the decision of the Court of Appeals for the 7th Circuit upholding the S. E. C.'s contention that "the continued existence" of North American Light & Power Co. "was in violation of the Act" and "that the dissolution was the result of a 'compulsory liquidation' by Congressional mandate", *City National Bank & Trust Co.* v. *S. E. C.*, 134 F. 2d 65, 67.

This case affirmed the S. E. C.'s order of dissolution in *North American Light & Power Co.*, 10 S. E. C. 924 and 11 S. E. C. 820:

> "On December 31, 1941 the Commission in conformity with its findings and opinion that the continued existence of (North American) Light & Power was in violation of the Act and that liquidation and dissolution were necessary to comply therewith entered its order that Light & Power be liquidated and its existence terminated. • • • (p. 65).
>
> "It is the contention of the Commission that the retirement was involuntary—necessitated by the Commission's order requiring liquidation and dissolution of the Corporation. • • • (p. 66).
>
> "We shall first consider petitioners' contention that the Commission erroneously determined that the dissolution was the result of a 'compulsory liquidation' by Congressional mandate". • • • (p. 67).

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its 'existence' may 'unduly or unnecessarily complicate the structure' of the two taken as a whole; *and the Commission cannot 'ensure' that the holding company's 'existence' shall not continue to do so without dissolving it.* In short, we cannot understand how the determination of these issues is different from a determination of the 'economic justification' for the 'continued existence' of the holding company." (Our emphasis.)

Protective Committee for Class A Stockholders of IHES v. SEC, 184 F. 2d 646 (C. A. 2, 1950).

"(The company's) sudden impulse to dissolve was born of the knowledge as to the requirements of the law. * * * The Commission was justified in finding that such action was the result of legal compulsion rather than the voluntary act of the corporation. Such finding is not impaired by the fact that the corporation was agreeable to and acquiesced in *that from which there was no escape.*" (p. 68).

"Action under legal compulsion is the antithesis of action by election or at the option of the moving party." (p. 69). (Emphasis supplied.)

City National Bank & Trust Co. v. *S. E. C.,* 134 F. 2d 65 (1943), C. A. 7.

(12) The decision of the Court below is in conflict with the decision of the Court of Appeals for the 6th Circuit that "any other conclusion" than dissolution is "impossible" for a company that "serves no economic purpose and no useful function" and that "this condition, which arose out of the existence of the System (company) and not out of its corporate structure, could be remedied only by terminating the existence of the System as a holding company." *Todd* v. *S. E. C.,* 137 F. 2d 475, 477-8.

This case resulted in affirming *International Hydro-Electric System,* 11 S. E. C. 888, which ordered dissolution:

"The record not only amply sustains the finding of the Commission that the *continued existence* of the System unduly and unnecessarily complicates the structure of its holding company system, *but makes any other conclusion impossible.* The System hires only six employees, four of them on a part time basis, with an annual payroll of approximately $17,000 * * *. The Commission correctly found that the System *serves no economic purpose* and *no useful function as a holding company* with respect to its subsidiaries. It also correctly decided that this condition, which arose out of the existence of the System and not out of its corporate structure,

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could be remedied *only* by terminating the existence of the System as a holding company." *Todd* v. *S. E. C.*, 137 F. 2d 475, 477-8, C. A. 6. (Emphasis supplied.)

(13) The decision of the Court below is in conflict with the decision of the Court of Appeals for the 2nd Circuit in *New York Trust Co.* v. *S. E. C.*, 131 F. 2d 274, 276.

This case affirmed 10 S. E. C. 1215, which required the dissolution of *United Light & Power Co.*, the Court saying:

> "This is especially true where, as here, *the essential existence* of one of the parties to a contract (United Light) *has become illegal and impossible* because contrary to a new concept of public policy which was unforeseeable when the contract was made." (Emphasis supplied.)
>
> *New York Trust Co.* v. *S. E. C.*, 131 F. 2d 274 at 276 (C. A. 2).

(14) The General Counsel of the S. E. C. has himself taken the position that dissolution of The United Corporation is mandatory under the Act.

In a brief filed with the S. E. C. in 1942 by Roger S. Foster who appeared in the court below as the S. E. C.'s General Counsel, and Harry G. Slater, the Chief Counsel of the Division of Public Utilities, until November 1950, these 2 chief legal officers of the S. E. C. said:

> "The United Corporation was a creation of, by, and for the bankers * * * J. P. Morgan & Co., Drexel & Co., (J. P. Morgan & Co.'s Philadelphia office) and Bonbright & Company, Incorporated * * * (p. 6).
>
> "The United Corporation is an undue and unnecessary complexity and should and must be dissolved" (p. 10).
>
> "The complexities which result from the continued existence of The United Corporation are

unnecessary since The United Corporation serves no useful function whatever" (p. 14).

"As is clear from the statement of facts set forth, *supra,* with respect to the history of United and the purposes for which it was created, United was intended to serve, has served, and presently serves no useful legitimate economic function" (p. 14).

"Inasmuch as United serves no function other than to concentrate economic power in a manner detrimental to the public interest, and because of the undue complexities which result from its continued existence, dissolution is the appropriate action which the Commission should require in order to insure compliance with Section 11(b) (2) of the Act. In subsequent sections of this brief, it will be seen that other suggested alternative solutions are inappropriate and not in the interest of security holders of United" (pp. 15-16).

Brief for Division of Public Utilities, In the Matter of The United Corporation, 13 S. E. C. 854.

(15) The present Director of the S. E. C.'s Opinion Writing Division in a leading law review article entitled "The Death Sentence or a New Lease on Life?", which mentions all available remedies under the Act, omits any mention of a transformation into an investment company as a means of "a new lease on life."

This article is in the University of Pennsylvania Law Review, Vol. 94, No. 2, p. 148, January 1946, and was written by 2 S. E. C. attorneys. One of them, Leonard Helfenstein, was then Supervising Attorney and is now Director, Division of Opinion Writing; the other author, Robert M. Blair-Smith, was then Executive Assistant to the Commission and is now in private practice (*Id.*, footnote, p. 148).

The "new lease on life" set forth in the article omits any reference to any past, present or future method of

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compliance by means of transformation into an investment company.* It states:

> "The manner in which some systems grew up resulted in the presence of corporate entities serving no useful function and making necessary their elimination, in some cases through their merger with other system companies (citing cases) and in others through transfer or distribution of their assets and their dissolution. (Citing the *American* and *IHES* cases)." (p. 160). (See also p. 158.)

POINT TWO.

Although Congress in preliminary drafts of the Act in 1935 authorized a program for compliance by transformation of holding companies into investment trusts, the Court of Appeals omits the fact that the S. E. C. subsequently and unanimously found in 1942 that Congress, in the final enactment, had "abandoned" and "eliminated the program * * * for the transformation of holding companies into operating companies or investment trusts".

Petitioners extensively briefed in the Court of Appeals the legislative history of the "death sentence" provisions [Sections 1(c) and 11(b)(2)] of the Act, and the S. E. C. cases thereon. The Court of Appeals in resolving the issue

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* No mention is made of a transformation into an investment company as a method of compliance by the writers of *Section 11 (b) of the Holding Company Act: Fifteen Years in Retrospect*, 59 Yale Law Journal 1088. This survey article is dated May 1950, and is often cited for authority by the SEC. The first sentence of this article's "Conclusion" (p. 1118) reads:

> "The 'death sentence' of the *functionless holding company* has been executed in an effective and yet singularly fair manner." (Our italics).

raised here did not refer to any of this part of the case and instead rested its decision on 2 cases that do not even refer to the possibility of any company complying with the Act by transforming into an investment company. Since this is the first time that the issue herein has reached the courts, and a federal statute of major importance is involved, it is unfortunate that the Court of Appeals omitted from any consideration in its opinion both the S. E. C.'s and petitioners' argument on the legislative history and intention. We will however make up the gap by supplying both arguments.

The S. E. C.'s argument on legislative history and intention rests on the unamended S. 2796.

In a press release dated August 20, 1951 the S. E. C. revealed for the first time the basis of its 1943 Finding that "In general we recognize the possibility that a holding company may comply with the statute by transforming itself into an "investment company." 13 S. E. C. 854 at p. . That this 1943 finding, for which no legislative citation or other authority was given, was inserted as a result of the improper consultations seems clear from the fact that only the previous year the S. E. C. had found on the basis of copious citation that Congress had "abandoned" and "eliminated the program * * * for the transformation of holding companies into operating companies or investment trusts." *The Commonwealth & Southern Corp.*, 11 S. E. C. 369, 376-7. However, the 1951 press release supplied the citations omitted in both the 1943 and 1951 opinions:

> "What it (Congress) told us (the S. E. C.) about the elimination of holding companies is set forth most explicitly in the Report of the Senate Interstate Commerce Committee reporting to the Senate the bill which

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became the Public Utility Holding Company Act of 1935. At page 11 that report indicated some of the possible courses under the Act as follows:

> 'presently existing public-utility holding companies must choose either—
>
> (a) To turn themselves into investment trusts by making legal arrangements which will deprive them of the control of the management of operating electric and gas companies in which they have investments, or
>
> (b) To rearrange or reduce their holdings in operating companies, if necessary, so that each holding company will control the management of only a single system of operating companies . . .'
>
> "The report goes further and explains the methods by which 'a presently existing utility holding company can become an investment trust' under the Act by transfers of property, divestments, enfranchisement of independent holders of securities, etc. (p. 13)."

As will be shown hereafter the S. E. C.'s press release did not tell the public the whole truth.

The S. E. C.'s Subsequent Findings that the Amended Bill "Abandoned" and "Eliminated the Program * * * for the transformation of holding companies into operating companies or investment trusts".

In footnote 123 to its 1943 Findings the S. E. C. said: "The management of United has indicated that it does not wish to be head of an integrated system, and indeed, *under our findings it cannot do so.*" Holding Co. Act Release No. 4478.

What then happens to the S. E. C. argument that the 2 choices of the Senate bill (S. 2796 as originally reported

on in S. Rep. No. 621, 74th Cong., 1st Sess.) were still open to the management *after* the amendment of that bill and the passage of the final enactment (S. 2796 as amended by the conferees and reported on in H. R. No. 1903, 74th Cong., 1st Sess.). Obviously, if the second choice was not open, then neither was the first choice; if the second choice was open, then so was the first choice. If the S. E. C. could veto either choice then there was no statutory right whatsoever for the company to make the choice. If the final enactment gave the S. E. C. the "discretion" to choose which remedy should apply, then this could not derive from the unamended Senate bill, on whose authority the S. E. C. said it acted, because that bill said the "companies must choose", not the S. E. C.

However, there is no need to argue the question at length because 7 years after the final enactment, the S. E. C. unanimously found that Congress had made "pertinent changes in the House amendment to S. 2796".*

> "* * * Furthermore, the provision in Section 30 of the Senate substitute, for an investment trust study, also appears clearly relevant to the program *then* contemplated; for as we have already noted, many holding companies that did not merge or con-

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* In 1940 one member of the S. E. C., then Chairman and now Circuit Judge Jerome N. Frank, sought to interpret the statute, so as to permit 1st degree or parent holding companies, to solve their Section 11(b) problems by conversion into "a true investment trust." His views to this effect were expressed in *The Electrical World*, April 13, 1940, p. 4 and *The Annalist*, June 6, 1940, p. 779, prior to any adversary issue before the full Commission. When the issue came on to be argued in an *adversary* proceeding before the S. E. C., the entire Commission although being referred to these minority expressions of its former Chairman unanimously found that Congress had "abandoned" and "eliminated the program * * * for the transformation of holding companies into operating companies or investment trusts".

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solidate with operating subsidiaries *were to become* investment trusts.[17] (Emphasis supplied).

* * * * * *

"* * * (The) Commission was authorized and directed by Section 30 to study the activities, corporate structures and influences of investment trusts *in connection with the part of the program looking towards the transformation of holding companies into that type of organization.*

"The principal *fallacy* in the contentions of the respondents here is that they are trying to relate Section 30 and its early legislative history *to a program that was subsequently abandoned.* The pertinent changes first occurred in the House amendment to S. 2796,[21] which eliminated the program of reorganizing public utility operating subsidiaries, and would have preserved holding company systems virtually as they existed and merely subjected them to regulation.

"The House amendment in those respects represented a reversal of previous policy * * * *and as we have seen, eliminated the program for the cessation of holding company relationships and for the transformation of holding companies into operating companies or investment trusts.* * * *

"The original program for the extensive corporate reorganization of public utility operating companies, to which the utility studies of Section 30 were

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"[17] See the analysis and the report cited in footnote 14, *supra.* (Footnote 14 reads: Sections 10(b)(2), 10(b)(3), and 10(b)(4) of the original House bill; Sections 11(b)(1), 11(b)(2), and 11(b)(3) of the Senate substitute. The functions and purposes of these sections are explained at length in the analysis submitted by Congressman Rayburn, Hearings (*supra,* footnote 7) at pp. 332-335, and in the report of Senator Wheeler, S. Rep. No. 621 (*supra,* footnote 8) at pp. 11-17.

"[21] Reported by Congressman Rayburn from the Committee on Interstate and Foreign Commerce, H. R. Rep. No. 1318 (74th Cong., 1st sess.) June 24, 1935.

geared, *was never revived.* Although the compromise finally enacted *directs the elimination of certain types of holding companies,*[24] it appears to contemplate the continuation of some holding company relationship. It contains no provision similar to the provisions in the original House bill and Senate substitute which required *each* registered holding company to "cease to be a holding company".[25] Like the House amendment, *the Act embodies no general program for* mergers and consolidations among operating companies or for their merger or consolidation with holding companies, or the *transformation of remaining holding companies into investment trusts.*[26]

"In short, whatever relationship there had originally been between the integration program and Section 30 was *eliminated* by the amendments embodied in the final enactment.[27]"

The Commonwealth & Southern Corporation, 11 S. E. C. 369, at pp. 370-7 (Decided May 15, 1942). (Emphasis supplied.)

"[24] *E.g.,* there must be eliminated any company whose continued existence 'unduly or unnecessarily' complicates the structure of the holding company system. See also Section 25.

"[25] It does provide, however, that there shall be no more than two tiers of holding companies above an operating utility. This provision, in Section 11(b)(2) of the Act, is commonly referred to as the 'great-grandfather' clause.

"[26] This is not to say that the final enactment prohibited such mergers, consolidations or transformation. *The program, however, was definitely changed* to one which provided for the limitation of operations on the part of the holding company systems, the simplification of complex corporate structures, and the redistribution of voting power on a fair and equitable basis." (Emphasis supplied.)

"[27] Nothing in the legislative history indicates the existence of any such relationship * * *. (The conference report) describes the present Section 11 (pp. 69-71) in terms which demonstrate *its entire self-sufficiency and omits the considerations outlined in the Rayburn and Wheeler statements* quoted *supra.*"

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At oral argument in the Court of Appeals counsel for the S. E. C. derived a statement of legislative intention from footnote 26. It is however one thing to say something was not prohibited, and another to say that the absence of the prohibition indicates a specific legislative intention to the contrary. The fact remains that here the S. E. C. said the program for conversion into investment trusts was not prohibited, but "abandoned" and "eliminated". As we will show hereafter it was most definitely prohibited as was any survival for useless companies.

The Conference Report on the Final Enactment Omitted the References in the Previous Sen. Report No. 621 to the Investment Trust Program.

The Conference Report states: "Paragraph (3) of the subsection (b) of the Senate bill is not included in the substitute * * *". This omitted paragraph required "*each* registered holding company * * * to cease to be a holding company." This also had to be done "Promptly after January 1, 1940," that is "within 5 years (with certain permissible extensions)." [Section 11(b)(3) of S. 2796, as unamended.] Thus the Senate bill struck at *all* holding companies, whether of 1st degree (parent), 2nd degree (grandfather), or 3rd degree (great-grandfather). The compromise bill relaxed the 5-year requirement, changing it to "as soon as practicable after January 1, 1938", and allowed the first and second degree holding companies to escape. This is the "relaxation" discussed in the conference report, not as S. E. C. counsel inferred in the Court of Appeals a relaxation for "great-grandfather" companies which, as we shall show in the next section, are dealt with explicitly in the report.

Nor is anything said in the report on the conference compromise bill about compliance by a program of conversion

into investment trusts. The previous report's references thereto are dropped out completely *and there are no subsequent legislative references to such a program.* Yet significantly enough, the earlier report's references to an integration program—the alternative method of compliance to that of the earlier considered investment trust conversion—are retained. (See H. R. Rep. No. 1903 at p. 70.) All the Congressional hearings and Congressional Record citations of counsel about an investment trust program refer to the earlier bills, none occur during or after the final enactment.*

The S. E. C. Reversed its Public Interpretation of the Legislative History Above Set Forth, with Respect to The United Corporation, During the Secret "Consultations".

We will show under Point Three that unidentified members of the Commission, or its Staff, communicated its 1943 deliberations privately to United's officials, not publicly, and then in the words of United's counsel negotiated "a course of compliance that would be accepted without further litigation". That is, it legalized the investment trust compliance device for a condemned and useless "great-grandfather" company. The vice here described is not merely that a change was made in the S. E. C.'s own previous interpretation of a crucial statutory question but that it was done secretly, *ex parte,* without a public record and resulted in the insertion into the 1943 decision of language legalizing for the first time for condemned and useless com-

* See Senator Wheeler and Congressman Rayburn's views on the final enactment. 79 Cong. Rec. 14164 and 14479. These, while referring to the integration program, omitted any reference to the investment trust program. Thus only one of the two options in S. 2796, as unamended, survived in the final expressions of the chief legislative sponsors of the Act.

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panies the "investment trust" compliance device.* This language was in direct reversal of the S. E. C.'s 1942 decision in the previously cited *Commonwealth & Southern Corporation* case, 11 S. E. C. 369, decided May 15, 1942, only 15 months before the United decision.

The relationship of United's case to the earlier *Commonwealth* decision is shown by the following facts. *In the S. E. C.'s brief before the Court of Appeals the entire legislative history and intent argument there relied upon is lifted from United's brief in 10 S. E. C. 814, which was specifically rejected by reference in 11 S. E. C. 369, the Commonwealth case.* Thus we have the S. E. C. now citing the very authorities it previously rejected but withholding such citation in its United opinion.

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*No holding company which has been condemned by the SEC, as has United and 73 other companies, for performing no legitimate economic function and for whom dissolution has been found "appropriate" escaped such dissolution prior to June 15, 1951, the date of the decision herein. During the entire 16 years prior thereto the SEC has had occasion to consider the investment company question only 2 other times. (The United decision has, however, stimulated the hopes of a trio of useless holding companies that they may follow this new route for the survival of the legally dead.) In these 2 uncontested cases, which are not cited by the *S. E. C.* in its 1951 Findings as precedents, it did not pass on the issues herein. See *Utilities Power & Light Corporation*, 5 S. E. C. 483 at p. 497 (1939); and *International Utilities Corporation*, Holding Company Act Release No. 6181 (1945). Utilities Power & Light Corporation was dissolved. Counsel ingeniously tried to argue in the Court of Appeals that these cases were precedents for United's, but examination of the opinions therein show that a subsidiary of International Utilities Corporation was granted an exemption from the Act, under Section 3(a)(5), as a company having "no public utility subsidiaries owning properties or conducting operation in the United States" (p. 8). Ogden Corporation is a successor to Utilities Power & Light Corporation, and was especially created to serve the function of being a vehicle to work-out a bankruptcy reorganization of a subsidiary of a well-known and highly successful and long-established investment company which was registered under the Investment Company Act, and which already owned 76% of Ogden's common stock. At no time did the S. E. C. find that Ogden was a useless or illegitimate company. Holding Co. Act Release No. 8402.

Prior to the *Commonwealth* decision in May, 1942, leading holding companies in the industry including United, Commonwealth, and Engineers Public Service (both since dissolved), had engaged in a similar series of delaying actions in compliance. These three companies urged that before the SEC could take administrative action against them under Section 11 it was required by Section 30 of the Act to complete certain studies therein referred to of the public utility industry and of investment trusts and investment companies. The argument was that until these studies had been completed the industry would not know what goals and objectives the SEC had in store for it as to the most appropriate grouping of companies in a permissibly integrated system under Section 11(b)(1), or alternatively which companies could become investment trusts. In dealing with the issue in the *Commonwealth* case, therefore, the SEC specifically noted that it was disposing of the same issue as had been raised by United and these other companies:

> "* * * Since similar questions have been raised in other proceedings under Section 11(b)(1),[5] we deem it appropriate to express our views on the Section 30 question at this time."

Thus the S. E. C. had already publicly rejected United's argument 15 months prior to the time it privately accepted it after the secret "consultations" and leaks hereinafter set forth.

"[5] E. G., *Engineers Public Service Co.*, et al. 7 S. E. C. 371, 1940 and 9 S. E. C. 764 (1941); *The United Corporation*, 10 S. E. C. 418 (1941); *The North American Company, et al* 11 S. E. C. 194 (1942) at footnote 3."

The Commonwealth & Southern Corporation, 11 S. E. C. 369.

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POINT THREE.

The administrative discretion of the S. E. C., if it existed, can not be sustained in view of the admissions that United's president and counsel privately "influenced" members of the S. E. C. in the exercise of that discretion after the record was publicly closed.

Hickey was appointed President of United in April, 1943, after the present General Counsel of the S. E. C. and the Public Utilities Division had formally recommended that the company be dissolved since it serves "no useful legitimate economic function" and "was never more than a corporate screen for the investment banking activities of its promoters." Holders of some 149,000 shares of United's Preference Stock, worth in 1943 from 2 to 5 million dollars, and including The Fidelity Philadelphia Trust Co., the Insurance Company of North America, and four other banks or insurance companies, appeared in support of the Division's position and against United's plan.* Without notification to these adversary stockholders nor to petitioner Phillips as the representative, at the annual meeting two months earlier, of 14,000 stockholders owning 1,800,000 shares of the Common Stock, Hickey and counsel decided upon direct action. While the issue of the Corporation's future was still pending before the S. E. C. and *after* the public hearings had been closed, briefs filed, and oral argument heard, Hickey proceeded with former S. E. C. General Counsel Burns to walk into the offices of some of the judges

* See petitioners' Application for leave to adduce additional evidence, pp. 5-6, thereof, of the unprinted Court of Appeals record.

—that is, certain unidentified Commissioners—and by his own admission *privately* discussed the case with them.*

The Court of Appeals summarized the matter as follows, 203 F. 2 at 615 (R. 396-7):

> "As we have noted, the Commission on August 14, 1943 ordered United to cease to be a holding company but did not direct dissolution. Some four months theretofore one William M. Hickey, formerly a member of the Commission's staff, had become president of United. In a subsequent phase of the proceeding, in 1944, Hickey testified, and in the course of cross-examination indicated that after he became president of United and before the decision and order of August 14, 1943, he had talked privately with members of the Commission *and that those conversations had influenced the decision.* Petitioners say that after that much had been said, counsel (Burns) for United objected to the line of questioning, the trial examiner sustained the objection, and further development of the subject was not permitted. It is with respect to this matter that petitioners have moved for leave to adduce additional evidence.
>
> "Were the order of August 14, 1943, now under review, we would probably grant the motion and remand the case to the Commission to take testimony concerning the conversations the witness Hickey said he had with members of the Commission between April, 1943 and August 14, 1943, about the content

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* Under the cross-examination permitted before Burns objected, Hickey admitted:

> "I had a number of conversations with members of the Securities and Exchange Commission * * *. And I believe those discussions led up to the issuance of the particular order that was issued on August 14, 1943. * * * I mean by that I told what I believed could be done and should be done, and in view of those circumstances that had quite a bearing on the particular order that was issued at that time" (Tr. Doc. No. 9, p. 93, *et seq.*).

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> and nature of the order then entered by the Commission, *which purportedly was pursuant to formal hearings and argument which had been closed before the conversations occurred.* But the order of August 14, 1943, is not subject to review in this proceeding. Moreover, it is fair on its face and is not, we think, basically unsound, as will appear from our discussion hereafter of points raised in connection with the order we are reviewing." (Emphasis supplied.)

Since, as we will show, the 1943 Findings and Opinion (as distinct from the 1943 Order) construed the statute as not making dissolution mandatory in this case and as permitting transformation into an investment company, which construction was consummated in the 1951 order reviewed by the court below, can it be fairly held that the 1943 acts of Hickey and Burns above set forth are immune from attack because they were not discovered until after the 60-day statutory time for review under Section 24(a) had expired? And may a 1951 Findings, Opinion and Order, which rest allegedly on administrative discretion, be affirmed as fair when it is shown that discretion was procured in advance by secret and improper acts in 1943 that settled the law of the case favorably to the actors in question?

The Leaks of the Confidential Judicial Deliberations of the S. E. C. to its Former Officials.

Although the S. E. C. steadfastly kept silent from 1943 to 1951 and prohibited any inquiry into these private conversations of its former officials, the Court of Appeals at oral argument on the motion to adduce additional evidence made inquiry of S. E. C. counsel and obtained confirmation that they had been held. Thereafter, United's counsel in their brief on the main case sought to defend the conversations and made further admissions as to what had occurred:

> "These consultations, *after the Commission had concluded to reject United's plan as filed,* were in all respects proper * * *. Having determined on the one hand that the Company's plan as filed was insufficient, and, on the other, that dissolution, as sought by the Commission's staff, need not be required, it was wholly within the administrative discretion of the Commission to confer with representatives of the company on a course of compliance that would be accepted without further litigation." (United brief, p. 9, in Court of Appeals.) (Emphasis in original.)

This argumentative attempt to shift the initiative for the "consultations" from United's officers to those of the S. E. C. makes clear an additional fact: that unidentified members of the S. E. C. or its staff leaked to Hickey and Burns the confidential judicial deliberations of the S. E. C. while it was formulating its opinion. How else did United know, prior to the public release of the Findings & Opinion, that "the Commission had concluded to reject United's plan as filed?"

In a prepared statement, dated May 6, 1952, filed by Burns before a subcommittee of the House Committee on Interstate and Foreign Commerce, which was investigating the matter, Burns stated *"we learned that the Commission was in what appeared to be a quandary."* From whom he learned this Burns has professed not to remember.* Burns

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* Senator Paul H. Douglas has stated that Burns was one of a group of former S. E. C. officials engaged "on a rather wholesale scale" in "the purchase and sale of (S. E. C.) influence as a commodity." Burns, he said, began the practice back in 1937 when he resigned as S. E. C. General Counsel "and almost immediately went into the practice of law, representing clients before the S. E. C." In "the famous United Corp. case * * * it is hard to avoid the conclusion that the decision was influenced by the representation of the company by former S. E. C. personnel." Congressional Record, Vol. 98, No. 28, February 25, 1952 at pp. 1344-1345.

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has admitted elsewhere that United's New York counsel, Mr. Richard Joyce Smith participated in the "consultations", but Mr. Smith has claimed "privilege" and refused to testify thereon.

In employing "secret personal solicitations" and in not disclosing them United counsel violated Nos. 3 and 26 of the Canons of Professional Ethics.

The present General Counsel of the S. E. C., Roger S. Foster, who was counsel for the Public Utilities Division at the time of the private "consultations", openly stated in the Court of Appeals that counsel for the Division were not notified of and consequently did not participate in the "consultations." Under the S. E. C. rules of practice the Division is "a party to all proceedings." (Rule XVII(a).) It is not allowed to approach the Commission *ex parte* in the opinion-formulating stage of the proceedings, after close of the public record:

> "The Commission's decisional process in proceedings of this nature is regarded as part of its quasi-judicial functions, and the status of the Division herein is that of a party to the proceedings whose contentions are heard and its arguments weighed together with those of all other parties and participants."
>
> *Commonwealth & Southern Corp.*, Holding Co. Act Release No. 8633, p. 42.

In actual fact there were 3 adversaries of the company, as shown at p. 855 of 13 S. E. C. 854:

> "Appearances:
>
> Roger S. Foster, Harry G. Slater and Sidney H. Willner, for the Public Utilities Division of the Commission.

E. A. Stuebner, Philadelphia, Pennsylvania, on behalf of certain preferred stockholders.

Gabriel Caplan, New York, New York, on behalf of Hettleman & Co., a stockholder."

Canon 26 of the Canons of Professional Ethics requires of a lawyer engaged in practice before a government agency "the same principles of ethics which justify his appearance before the courts; but it is unprofessional for a lawyer so engaged * * * to employ secret personal solicitations." Canon 3 requires that "a lawyer should not communicate or argue privately with the judge as to the merits of a pending cause." It is clear that Burns and his associate Richard Joyce Smith violated these canons.*

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* In the Court of Appeals brief, United's counsel asserted "This was not a proceeding in which there was an adversary other than the Commission itself." (p. 9.) But the same counsel, Mr. Richard Joyce Smith, thought the appearances of these stockholders sufficiently adversary at the time to devote to them 10 pages of his and Mr. Burns' brief headed: "The special interests of a particular group of stockholders should not control the decision in this case." (pp. 10-20, Brief for The United Corporation, dated September 19, 1942.) These stockholders, it should be noted, filed no separate brief because they were protected by the brief of the Public Utilities Division, which specifically incorporated at page 45 a statement in opposition to United's plan by these holders of over 149,000 shares of the Preference Stock. As previously noted, these shares had a current market value in 1943 ranging from $17 to $35 a share, or roundly 2½ to 5 million dollars, and were owned by The Fidelity Philadelphia Trust Co., Insurance Co. of North America and 4 other banks or insurance companies. (See Statement of E. A. Steubner, at pp. 349-353 of S. E. C. File No. 59-25.)

In addition to the exclusion from notification and participation in the "consultations" of these parties, there was no notice to petitioner Phillips who had received proxies from 14,000 stockholders owning some 1,800,000 shares or 12% of the common stock. Had the S. E. C. reopened its record publicly and issued its routine public notification of such reopening, it is obvious Phillips would have been under a duty to participate in view of his position taken a few months earlier at the 1943 meeting and the large response to it.

By deciding the issues herein on the admitted basis of the secret "consultations", the S. E. C. violated Section 11 of the Act which required that an order issue only "after notice and opportunity for hearing."

The fact that United's counsel notified neither the Division's counsel nor the counsel for any of the 3 opposition stockholder groups is a plain indication that they were obviously relying on a successful concealment of the secret "consultations". If these were not improper, why were they not placed upon the public record? Why did both the S. E. C. and United's counsel thereafter collaborate in refusing to allow their full details to be revealed on the record? Finally, if the "consultations" were simply for the purpose of bringing United into agreement with the S. E. C., why was not the agreement, when made, publicly announced instead of first having the S. E. C. publish its Findings & Opinion on August 14, 1943 with no indication of the agreement? It was not until September 13, 1943 that United publicly stated to its stockholders that it would not litigate the August order. Meanwhile the S. E. C. kept silent and after another 30 days the time expired for review at the behest of any aggrieved persons.

Thereafter, the fact that the "consultations" had resulted in the legalization of the investment company transformation as a proper device and appropriate remedy for a "great-grandfather" and economically useless holding company, could not be attacked before the S. E. C. or in any court until the 1950-1952 proceedings. Then the S. E. C. approved consummation of the program privately agreed to in 1943,* and did so without permitting any evi-

* By inserting into their joint appendix at pp. A 17-20 an amputated part of a proxy letter by Phillips dated February 22, 1943, *which is not in the S. E. C. record of this case* and failing so to disclose to the Court of Appeals, respondents sought to imply that petitioner Phillips, as distinct from petitioner Downing and

dence to be received on the "consultations" and without ever referring to petitioners' argument on the statutory intention to dissolve all useless holding companies.

The effect has thus been to deny petitioners any hearing on these issues.

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the other petitioners herein, has no standing to argue prejudice from the 1943 "consultations" because he was opposed to immediate dissolution and that all that happened as a result of the "consultations" was to stop a dissolution order from being issued. The non-record inserted material relied on for this contention stated:

> "In my judgment, dissolution *at this time* is obviously not to the benefit of either the Common or Preferred stockholder. (Our emphasis.) If the dissolution were to the benefit of the stockholders, I would not oppose it, but I would do all I could to hasten it."

The second sentence was omitted in the quotation in United's brief, pp. 39-40. "At this time" that is February 22, 1943, both stocks were under water. The statute gave United a minimum of 2 years to comply with an order of dissolution. [Section 11(c)]. Thus, if the order had not been withheld in 1943, it would have given United at the minimum until August 1945 to comply, at which time both stocks were substantially above water, the common having a net equity based on current market values of 52 million dollars as of Dec. 31, 1945. In actual practice the S. E. C. has given companies ordered to dissolve from 2 to 10 years to comply. When United's stocks did recover to an above-water position, petitioner Phillips consistently and continuously sought to achieve dissolution. (See Holding Co. Act Release No. 7191, pp. 1, 4 (1947); No. 9431, p. 6 (1949); and *Phillips* v. *S. E. C.*, 185 F. 2d 646.

In his February, 1943 proxy letter Phillips pointed out that United had, at the end of 1942, a total of 35 investments, of which 2 had a market value of about $10,200 more than their original cost, while the remaining 33 showed total market losses from original cost or declared value of 510 million dollars (Tr. Doc. 286, p. 7849). In the face of such a uniquely bad investment record which had been especially emphasized by him in the 1943 contest, it is obvious that Phillips did not approve legalization of the proposed investment company transformation. Nor would he have approved it had the S. E. C. given him a chance to express his views. Throughout the 1943-1951 proceedings petitioners were forced to conclude that the S. E. C. had decided this issue *ex parte*. Thereafter they did their best to get protective provisions into the investment company plan, and procured a withdrawal provision, cumulative voting and an increase in quorum requirements, but none of these reforms are sufficient to terminate the abuses revealed by United's history.

As a matter of law and public policy the S. E. C. should be required to impose the remedy of dissolution that it found "appropriate" before the secret "consultations" and leaks of its judicial deliberations.

On August 14, 1943, following the secret "consultations," the S. E. C. issued its Findings, Opinion and Order under Section 11(b)(2), the "death sentence" section, of the Holding Company Act. But the Order only directed that United (1) cease to be a holding company, (2) reduce its capitalization to one class of stock; and (3) proceed to comply with the order with due diligence (13 S. E. C. 854). That part of the Opinion which was not "influenced" and had obviously been written before the consultations is easily separable in the light of Hickey and his counsel's admissions. It reads in part as follows:

> "* * * United contributes nothing to the normal functioning of the system companies and is therefore *economically unnecessary* to their operations. United thus needlessly extends the corporate pyramid in the holding company system of which it is a part, and we find, accordingly, that its continued existence unduly and unnecessarily complicates its holding company system within the very terms of Section 11(b)(2). * * * The corporate existence of United also extends the holding company pyramid beyond the degree permitted by the second sentence of Section 11(b)(2), commonly known as the 'great-grandfather' clause.
>
> For *the unnecessary corporate existence of United* and the complexities resulting therefrom the stockholders of United have paid a price. When dividends on its common stock portfolio are received by United, a part thereof must be allocated to meet operating costs and taxes. These costs for the most part consist of salaries, legal and auditing fees and other administrative expenses, all of which together with

taxes have amounted to $10,099,785 from the date of organization of United through March 31, 1942, or an average of $762,248 per year. This yearly average amount * * * constitutes the price paid by United's stockholders for the collection of dividends, which without the interposition of United would have reached them directly at no additional cost * * *.

We have thus far determined that * * * the continued existence and corporate structure of United unduly and unnecessarily complicate the structure of the holding company system of which it is a part, and unfairly and inequitably distributes voting power among the security holders of that system. We have determined that the corporate structure of United unfairly and inequitably distributes the voting power among the security holders of that company. The problem remains as the appropriate remedy under Section 11(b)(2) to ensure the correction of this situation. It seems clear that *dissolution would be appropriate in this case.*"[122]

It is pertinent to observe that the cases cited in the above footnote 122 were, in the first instance, a dissolution of a "great-grandfather" holding company which the S. E. C. held was mandatory under the Act. In the second case a "great-grandfather" holding company was not involved, but the S. E. C. held that dissolution of a useless company without legitimate functional purpose was also mandatory under the Act's standards. This view was confirmed by this Court in *American Power & Light Co.* v. *S. E. C.*, 329 U. S. 90, 109, 110, 112.

But the hand of the ex-S. E. C. officials is now visibly seen in the concluding part of the 1943 Findings and Opinion in the *United* case. After noting that on March 4, 1941

"[122] See *International Hydro-Electric System*, Holding Company Act Release No. 3679; *American Power & Light* and *Electric Power & Light*, Holding Company Act Release No. 3750."

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United had filed a plan to reduce its holdings in its statutory subsidiaries to less than 10% of the voting stock and then to register as an investment company under the Investment Company Act of 1940, the S. E. C. stated:

> "* * * It seems clear that dissolution would be appropriate in this case (footnote omitted). However, the management of United has stated many times that it is desirous of entering into the business of an investment company (footnote omitted). While, as we have seen, no substantial progress has been made in this direction, we are nevertheless not prepared to say that it is not a possible solution to the problems of this company under the Act. * * * Under all the circumstances of this case we have determined that *we will withhold the issuance of a dissolution order* and will require only that United correct the inequitable distribution of voting power within its own company by recapitalizing with a single class of stock and that it shall cease to be a holding company." (Emphasis supplied.)
>
> *The United Corporation,* Holding Co. Act Release No. 4478, p. 50; 13 S. E. C. 854.

Thus, the S. E. C. found on substantial evidence that United served no legitimate economic function and that the remedy of dissolution was "appropriate". By withholding this "appropriate" remedy, then retreating from it, and adopting in 1951 in the present proceeding a contrary remedy without evidence or findings that it was, in the words of this Court, the "most appropriate" remedy, it violated a basic principle of administrative law.

> "The Commission is the body which has *the statutory duty* of considering the possible solutions and choosing *that* which it considers *most appropriate* to the effectuation of the policies of the Act. Our review

> is limited solely to testing the propriety of *the remedy so chosen* from the standpoint of the Constitution and the statute." (Our emphasis.)
>
> *American Power & Lt. Co.* v. *S. E. C.*, 329 U. S. at 118.

At no time has the S. E. C. made any findings as to the superior appropriateness of the substituted remedy, nor has it or the Court of Appeals indicated any "substantial evidence", as required by Section 24(a) of the Act, on which it bases its choice of remedy. Since the choice was based on a claim of administrative discretion and that discretion was procured secretly, there is a plain abuse of discretion which, under any equitable consideration, prohibits the consummation of the Acts so approved and compels the issuance of the order improperly withheld. Certainly, at the minimum, the president and counsel who performed the improper acts should not be allowed to be the beneficiaries of their improprieties by being continued in office. *S. E. C.* v. *Chenery Corp.*, 318 U. S. 80, 85.

The concealment of the "consultations" and leaks deprived petitioner Downing and 22,081 opposition stockholders of their right under Section 24(a) of the Act to a judicial review on the petition of "any person or party aggrieved" by the 1943 Findings, Opinion and Order.

The fact that Hickey had private post-hearing, predecision "consultations" with members of the S. E. C. was not discovered by any of the petitioners until more than 60 days after the issuance of the Findings, Opinion and Order of August 14, 1943. Thus objection by way of a statutory petition for review was impossible, since the time limit set by Section 24(a) of the Act had expired. It was not until April 22, 1944 that Hickey admitted, under cross examination, that he had engaged in his *ex parte* conferences.

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At no time prior to its counsel's appearance in the Court of Appeals on the present case in 1951 did the S. E. C. confirm that the "consultations" and leaks had occurred. At that time it continued to oppose granting of petitioners' application for leave to adduce additional evidence. Steadfastly from 1944 to date the S. E. C. has invoked what it conceives to be its "privilege" so as to block any inquiry into these matters.

Thus, if the Court of Appeals is correct in refusing to interfere in this matter on the ground that the time for review has expired, it would seem that petitioners' only recourse is to file a motion before the S. E. C. to vacate the 1943 order insofar as it "withheld" dissolution on the ground that it was procured by fraud. This Court should grant the petition herein in order to expedite review and final settlement of the issue.

The Court of Appeals found that "it is within the discretion of the Commission to permit a public utility holding company to cease to be such by becoming an investment company and that it is not required by statute to order dissolution" (R. 411). If the Court is correct in so finding, then it is clear that the exercise of the S. E. C.'s favorable discretion was procured by fraud and at the least the S. E. C. abused its "discretion" in deciding the issue on the basis of the "consultations", and in abiding by that decision in its 1951 Findings, Opinion and Order. Furthermore, no case is cited by the Court of Appeals for its holding that the issue is one of "discretion" rather than statutory mandate. Neither of the 2 cases cited for the proposition that dissolution is not mandatory even refer to a proposal for permitting a holding company, much less a "great-grandfather" one which has been found to serve no legitimate purpose, to transform into an investment company.

That the exercise of the Commission's "discretion" in 1943 so as to withhold an order of dissolution and permit a course looking toward the transformation was an abuse of discretion, was an issue the Court of Appeals did not discuss.*

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* In *Morgan* v. *United States*, 304 U. S. 1, "the rudimentary requirements of fair play" to a party in an administrative proceeding were outlined:

> "These demand 'a fair and *open* hearing,'—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important government process. Such a hearing has been described as an 'inexorable safeguard' (p. 15).
>
> "If in an equity cause, a special master or the trial judge permitted the plaintiff's attorney to formulate the findings upon the evidence, conferred *ex parte* with the plaintiff's attorney regarding them, and then adopted his proposals without affording an opportunity to his opponent to know their contents and present objections, there would be no hesitation in setting aside the report or decree as having been made without a fair hearing. The requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as the beginning and intermediate steps.
>
> "The answer that the proceeding before the Secretary was not of an adversary character, as it was not upon complaint but was initiated as a general inquiry, is futile. It has regard to the mere form of the proceeding and ignores realities. * * * It is idle to say that this was not a proceeding in reality against the appellants when the very existence of their agencies was put in jeopardy" (pp. 19-20).

N. L. R. B. v. *Botany Worsted Mills*, 106 F. 2d 263, 265, states:

> "If in fact he was of counsel in the prosecution of the cause and the Board heard him *ex parte*, the absence of due process would be conceded * * *."

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POINT FOUR.

Assuming, *arguendo*, that Congress because of the earlier drafts of the Act intended that a holding company could transform into an investment company, it nevertheless made clear that the latter company was to be a "legitimate investment company" that did not perform "the function of control and management."

The President's message to the Congress on March 12, 1935 (House Document No. 137, 74th Congress, 1st Sess.) transmitted the report of the National Power Policy Committee and was immediately followed by the introduction in the House and Senate of the bills that became the present Act. In this message, the President said:

> "We do not seek to prevent the legitimate *diversification* of investment in operating utility companies by *legitimate* investment companies. But the holding company in the past has confused *the function of control and management* with that of investment and in consequence has more frequently than not failed in both functions. Possibly some holding companies may be able to divest themselves of the control of their present subsidiaries and become *investment trusts.* But an investment company ceases to be an investment company when it embarks into business and *management.* Investment judgment requires the *judicial* appraisal of other people's management. • • •
>
> • • • Regulation has small chance of ultimate success against the kind of concentrated wealth and economic power which holding companies have shown the ability to acquire in the utility field. No Government effort can be expected to carry out effective, continuous, and intricate regulation of the kind of private empires within the Nation which *the holding-company device* has proved capable of creating. • • •

> • • • If we could remake our financial history in the light of experience, certainly *we would have none of this holding-company business.* It is a device which does not belong to our American traditions of law and business. • • • And it offers too well-demonstrated temptation to and facility for abuse to be tolerated as a recognized business institution. That temptation and that facility are inherent in its very nature. It is a corporate invention which can give a few corporate insiders unwarranted and intolerable powers over other people's money. • • •
>
> • • • It is time to make an effort to reverse that process of the concentration of power • • • of a very few, who, by devices such as holding companies, have taken for themselves unwarranted economic power. • • •

The above sections of the President's message are incorporated in S. Rep. 621, 74th Cong., 1st Sess., pp. 2-3, the very report upon which the SEC relies for sanction for allowing United to become a non-diversified holding company in fields other than that of the public utility industry.

It is clear therefore that when Congress took over from the President's message the concept of the investment trust, it adoptd a term that meant (1) "legitimate diversification of investment"; and (2) absence of "the function of control", and (3) "of management".

It now remains to be seen whether United's plan is for conversion into an investment trust, as understood both by Congress and the SEC, or is simply for perpetuation of itself as a non-diversified holding company in fields other than public utilities. The so-called Plan for Future Operations is described at page 14 (f.n.) of this petition. It explicitly states that United is to be "a closed-end, non-diversified management company" and will so register

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under the Investment Company Act of 1940.* In addition it contemplates "the purchase of working control in businesses" of various kinds. It will be seen from reading (b), (c), (d), and (e) of the "special situation" investments authorized under the plan that control of the various companies whose securities are to be purchased is necessarily involved. Furthermore (f) authorizes "the participation in new or existing enterprises along with qualified associates." This means, of course, participation in management.

In short, we have a proposal approved by the SEC that clearly offends against the principles stated in the President's message and the Senate Report and which simply perpetuates "the holding-company device", with its illegitimate non-diversified character and the function of control and management. The only difference is that now the device instead of being applied to the public-utility industry is to be applied to other industries. Plainly this is against the legislative intention, which was to strike at an evil not be transferring it to other industries but by abolishing it.**

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* Section 5(b) of the Act defines a diversified and a non-diversified company as follows:

> (1) "Diversified company" means a management company which meets the following requirements: At least 75 per centum of the value of its total assets is represented by cash and cash items (including receivables), Government securities, securities of other investment companies, and other securities for the purpose of this calculation limited in respect of any one issuer to an amount not greater in value than 5 per centum of the value of the total assets of such management company and to not more than 10 per centum of the outstanding voting securities of such issuer.
>
> (2) "Non-diversified company" means any management company other than a diversified company.

** "It is well settled that the terms of an exception to the general policy of a statute must be strictly construed against the claimant of its benefit:

> "* * * it is insisted that the exception in the act should receive such a broad construction as would destroy the plain purpose which caused the act to be adopted. But to so treat

Conclusion.

For the reasons stated, this petition for a writ of certiorari to the Court of Appeals for the District of Columbia Circuit should be granted.

Respectfully submitted,

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June 26, 1953.

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the act would be in plain disregard of the elementary rule requiring that exceptions from a general policy which a law embodies should be strictly construed, that is, should be so interpreted as not to destroy the remedial processes intended to be accomplished by the enactment.' *Spokane & Inland Empire R. R. Co.* v. *U. S.*, 241 U. S. 344, 360 (1916); *S. E. C.* v. *Sunbeam Gold Mines Co., et al.*, 95 F. 2d 699, 701 (C. A. 9, 1938). 'The general rule of law is, that a proviso carves special exceptions only out of the body of the act; and those who set up any such exception must establish * * *' *Ryan* v. *Carter*, 93 U. S. 78, 83; quoted wih approval in *Schlemmer* v. *B. R. & P. Co.*, 205 U. S. 1, at 10."

Engineers Public Service Co., 9 S. E. C. 776, footnote 24.

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